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No. 6941

United States
Circuit Court of Appeals
For the Ninth Circuit

NGAI KWAN YING,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, California,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES OF ATTORNEYS:

STEPHEN M. WHITE, Esq., 576 Sacramento St., San Francisco, California,
For Petitioner and Appellant.

United States Attorney, San Francisco, Calif.,
For Respondent and Appellee.

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 20,873-L.

In the Matter of

NGAI KWAN YING,

on Habeas Corpus;

No. 31167/7-12; ex SS President Coolidge, December 29, 1931.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable, the Southern Division of the United States District Court, for the Northern District of California:

The petition of Kwan Tow respectfully shows:

I.

That he is a person of Chinese descent.

II.

That he was born in China and that he has always been and is now a subject of China.

III.

That he first arrived in the United States on February 28, 1921, at which time he was examined by the United States Immigration authorities for the Port of San Francisco as to his qualifications for admission to the United States and that, as a result of said examination it was found and conceded by the said immigration authorities that he was entitled to admission, as the minor son of a lawfully domiciled Chinese merchant of the United States, and that he was, thereupon, permitted to enter and to remain in the United States. [1]*

IV.

That immediately following his admission to the United States as aforesaid, he began to reside in the United States and continued to reside and remain therein at all times, save for the following trip to China: departed January 31, 1931, and returned December 29, 1931; that, on the occasion of his departure from and return to the United States as aforesaid, he was examined by the United States Immigration authorities for the Port of San Francisco, as to the legality of his residence in the United States, and that, as a result of said examination, it was found and conceded by the said immigration authorities that he was a lawfully domiciled resident, who was entitled to depart from and to return to the United States.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

V.

That, at Ping Kai Village, Far Yuen District, China, on April 6, 1931, he married a Chinese person by the name of Ngai Kwan Ying, who has ever since been and is now his wife.

VI.

That, on the 29th day of December, 1931, his said wife, Ngai Kwan Ying, arrived in the United States from China and, thereupon, applied to the United States Immigration authorities for admission to the United States under the status of a wife of a lawfully domiciled merchant of the United States.

VII.

That the hearing of the application of the said Ngai Kwan Ying for admission to the United States was heard by a Board of Special Inquiry, which was convened by the Commissioner of Immigration for the Port of San Francisco, and that, as a result of said hearing, it was decided by the said Board of Special Inquiry, as follows:

1. That your petitioner is a lawfully domiciled Chinese merchant of the United States. [2]

2. That the said Ngai Kwan Ying is not the wife of your petitioner.

That an appeal from the decision of the Board of Special Inquiry was taken to the Secretary of Labor with the result that the decision of the Board of Special Inquiry was affirmed.

VIII.

That the said Ngai Kwan Ying is now in custody of John D. Nagle, Commissioner of Immigration for the Port of San Francisco, County of Marin, State and Northern District of California, and that the said John D. Nagle, acting under the order of the Secretary of Labor, has given notice of his intention to deport the said Ngai Kwan Ying to China on the first available steamer and, unless this Court intervenes, the said Ngai Kwan Ying will be deported away from and out of the United States to China on the SS "President Wilson," which sails from the Port of San Francisco on the 26th day of February, 1932.

IX.

That your petitioner alleges, as he is advised and believes that the Board of Special Inquiry and the Secretary of Labor and each of them, in excluding the said Ngai Kwan Ying, hereinafter referred to as the detained, from admission to the United States and in ordering her deportation to China, and the said John D. Nagle, in holding her in custody so that her deportation may be effected, are unlawfully, confining, restraining and imprisoning her in each of the following particulars, to-wit:

1. That at the hearing before the Board of Special Inquiry, your petitioner and the detained testified, in agreement, upon the existence of the relationship of husband and wife between them, as fol-

lows: that your petitioner is named Kwan Tow, that he is also named Kwan How Baw and Kwan Gong Tow, that he resides at No. 916 "H" [3] Street, Modesto, California, where he is engaged as a merchant with the firm of Golden Star Meat Company; that the detained is named Ngai Kwan Ying, that she is 19 years old and that she is a native of Sing Ngai Jong village, Far Yuen District, China; that your petitioner and the detained were married at Ping Kai village, Far Yuen District, on April 6, 1931, that the marriage took place at the home of the petitioner, that the detained arrived at the home of the petitioner shortly after sundown on the day of the marriage, that she had come from her native village and that she was accompanied by two women attendants, that three feasts were held in connection with the marriage, that the first feast was held on April 2, 1931, that the second feast was held on April 6, 1931, and the third feast was held in the afternoon of April 7, 1931, that the last feast was held in the ancestral hall in Ping Kai village and that there were between 20 and 30 tables spread, that at this feast the men sat together and the women sat together, that on the day following the marriage ancestral worshipping took place in the parlor of the first house at the north of the village, that there is a shrine loft in the parlor of this house and upon this shrine there is set an ancestral tablet; that the father of the petitioner is named Kwan Chong, that he is also known as Kwan Soon

Jew, that he is 50 years old, and that he resides at Stockton, California; that the petitioner's mother's name was Wong Shee, that she died in February, 1931, at Ping Kai village, that she is buried at Ai Leung Jai Hill, which is located about 6 lis (2 miles) to the rear of Ping Kai village; that the petitioner has two brothers, Kwan Low, 32 years old, residing at Modesto, California, and Kwan Moon, 29 years old, at present in Ping Kai village, and one sister Kwan Yit Gew, 27 years old and living in the Straits Settlements; that Kwan Moon resides in the United States, but that he has been in China since January 5, 1931, that while in China he has been [4] living at Ping Kai village; that Kwan Low is married to Gong Shee, 32 years old, who has natural feet, that Kwan Low and Gong Shee have three sons, Kwan Tung Fook, 15 years old, Kwan Tung Look, 13 years old, and Kwang Tung Foo, 11 years old, and one daughter, Kwan Yook Lin, 12 years old, all of whom are living at Ping Kai village; that Kwan Moon is married to Wong Shee, 29 years old, who has natural feet, that Kwan Moon and Wong Shee have one son, Kwan Tung Gwai, 11 years old, that Wong Shee and Kwan Tung Gwai live at Ping Kai village; that the petitioner was previously married to Wong Shee, that she died in 1925, that he had two sons by Wong Shee, that the sons are Kwan Dung Sow, 14 years old, and Kwan Dung Chun, 13 years old, both of whom are living at Ping Kai village; that the detained's father is

named Ngai Goon Som, that he is about 37 years old, that her mother is named Hor Shee, about 37 years old, that she has natural feet, that Ngai Goon Som is a farmer and that he resides at Sing Ngai village with his wife; that the detained has one brother, 11 years old, living with his parents at Sing Ngai village; that Sing Ngai village is about 10 lis (about 3 miles) west of Ping Kai village, that it has six dwelling houses and one ancestral hall, that the houses are arranged in four rows, that the detained's house in that village is the second in the first row counting from the west, that the petitioner and the detained visited the parents of the detained at Sing Ngai village on one occasion in November, 1931, that this was the occasion of the betrothal of the detained's brother; that from the time of the detained's marriage until her departure for the United States she lived with the petitioner in the home of the petitioner at Ping Kai village, that this village has four dwellings and one social hall, that in back of each of those five houses there is one small house, that the village is not a part of another village, near this [5] village is Lock Chung village, which is about 2 lis (2/3 of miles) to the east, that there is no wall or barrier around Ping Kai village, but there is a bamboo hedge along the rear of the village, that there is a pond in front of the village, that there are no entrance gates to the village, that the small house to the rear of the petitioner's house belongs to the petitioner and is used

for storage purposes, that the petitioner's house is the first in the second row counting from the north, that this house was occupied by the petitioner, the detained and the two sons of the petitioner by his first wife, that the first house in the first row from the north is vacant, that this house was used for cooking purposes by the wives of Kwan Moon and Kwan Low and by the detained, that Kwan Low's family lives in the third house from the north, that Kwan Moon's wife and family live in the fourth house from the north, that the small houses to the rear of the dwellings are not used for living purposes, that the house behind the fourth dwelling is used for storage, that the house behind the first dwelling is used as a storage place for a rice pounder and a rice mill, that the small house to the rear of the social hall is used as a kitchen on festive occasions; that the families of the petitioner's brothers and the family of the petitioner ate their meals together in the first house at the north in the kitchen on the north side of the house; that the house of the petitioner and the detained is a one-story brick building, that it has two bedrooms, two kitchens, a parlor and an open court, that it has tile floors in all the rooms, that the open court is paved with stone, that it has two outside entrances, that it has no outside windows, but there is a double skylight in each bedroom and a single skylight in each kitchen, that the skylights are covered with glass, that there are no portable stoves in the house,

but the kitchen on the north side has a permanent stove, that there is no stove at all [6] in the kitchen on the south side, that the detained and the petitioner slept in the bedroom on the north side, that the two sons of the petitioner slept in the bedroom on the south side, that there is only one bed in the north bedroom, that it is a new bed, painted different colors and with carving on it, that there is a table, rectangular shaped, a wardrobe and two chairs in the north bedroom, that there is no clock of any kind in the house; that the two sons of the petitioner attend school at Lock Chung village, but that they always sleep at home; that the detained has been to Canton City on two occasions with the petitioner, that the first occasion was in October, 1931, for the purpose of seeing the American Consul and the second time was when the petitioner and the detained were enroute to the United States; that the petitioner and the detained embarked for the United States at Hongkong, that they travelled from Ping Kai village by foot to Ping San Market, about five lis (one and 2/3 miles) west, that they took an auto stage from Ping San Market to Sun Gai Railway Station, where they took a train for Canton City, that a steamer was taken from Canton City to Hongkong; that while in Canton City on the first visit there, the petitioner and the detained remained about eight or nine days, that they stayed at the Man On Jan Hotel, that they occupied the same room; that the detained became acquainted for

the first time with a lady named Au Yeung Shee at the marriage feast of the petitioner and the detained, that this lady is from the Ping Sang Jung village, Far Yuen District, China, that she thereafter met the detained and the petitioner at the Man On Jan Hotel at Canton City when the petitioner and the detained and Au Yeung Shee were enroute to the United States.

2. That, at the hearing before the Board of Special Inquiry, there appeared as a witness in behalf of the detained, a lady by the name of Au Yeung Shee, who testified as follows: that she is 30 years old, that she is a native of Ping Sang Jung village, Far Yuen [7] District, China, that she first came to the United States in 1920, that she resides at Stockton, California, that she was last in China in 1931, and that she then resided at Ping San Jung village, that this village is located about 11 or 12 lis (about 4 miles) from Ping Kai village, that she first became acquainted with the detained in April, 1931, when she attended the wedding of the petitioner and the detained at Ping Kai village, that she attended the feast held in connection with the wedding at the small social hall in the village, that this feast was held at about 4 o'clock in the afternoon, that there were about 20 tables set for this feast, that the men sat together at this feast, that Ping Kai village contains four dwelling houses and several small houses, that there is no wall around the village, but that there is a grove of bamboo trees to the rear of the

village, that there are no entrance gates to the village, that, when enroute to the United States, she stayed overnight at Canton City, that she there met the detained for the second time at the Man On Jan Hotel in this city, that the detained and the petitioner were occupying the same room at this hotel, that the room was located on the third floor.

3. That, at the hearing before the Board of Special Inquiry, there were introduced in evidence documents constituting a marriage certificate and that these documents certify to the marriage of the petitioner and the detained.

4. That, at the hearing before the Board of Special Inquiry, the petitioner identified the detained as his wife and the detained identified the petitioner as her husband.

5. That it is conceded by the Board of Special Inquiry that the testimony of the petitioner and the detained is in good agreement. [8]

That your petitioner alleges that the fact that your petitioner and the detained have testified in agreement as to the date and place of their marriage, the conditions under which the marriage ceremony was performed, the events preceding and following the marriage, the places where your petitioner and the detained have lived together, the description of the village in which they have lived, the description of the house in which they have lived, the family history of each, the fact that there

has been introduced in evidence a marriage certificate certifying that the petitioner and the detained were married, the fact that the detained and the petitioner have cohabited as wife and husband, the fact that the detained identified the petitioner as her husband and that the petitioner identified the detained as his wife and the fact that the Board of Special Inquiry conceded that the testimony of the detained and the petitioner is in good agreement, established the existence of the relationship of wife and husband between the detained and the petitioner and the Board of Special Inquiry and the Secretary of Labor, in deciding that the detained was not the wife of your petitioner, have thereby acted arbitrarily and unfairly and have denied the detained the full and fair hearing to which she was and is entitled.

X.

That the Board of Special Inquiry and the Secretary of Labor, in denying the existence of the relationship of wife and husband between the detained and the petitioner have urged certain immaterial and collateral matters, which are disclosed in the findings of the Board of Special Inquiry, a copy of which findings is filed herewith as Exhibit "A," which exhibit is hereby expressly referred to and made a part of this petition with the same force and effect as if set forth in full herein; that your petitioner alleges that the said matters urged by the Secretary of Labor and the Board of Special [9]

Inquiry have reference to the fact that your petitioner testified in 1923 in behalf of his alleged mother, Wong Shee, and in behalf of his alleged sister, Kwan Yit Gew, and that although it was then found by the immigration authorities that Wong Shee and Kwan Yit Gew were not his mother and sister, respectively, nevertheless, he now insists that they are and to the fact that your petitioner's brother, Kwan Moon, has given varying testimony as to the location of the houses in the petitioner's village; that your petitioner alleges that his status as a lawfully domiciled resident of the United States is conceded by the Board of Special Inquiry and the Secretary of Labor in the case of the detained and that the fact that the immigration authorities have found that the persons for whom the petitioner testified in 1923 were not the mother and sister of the petitioner and the fact that the petitioner's brother, Kwan Moon, has given varying testimony as to the location of the houses in the petitioner's village are manifestly immaterial to the issue of the legality of the domicile of the petitioner in the United States and to the issue of the existence of the claimed relationship between the petitioner and the detained; that, in urging these immaterial and collateral matters, the Board of Special Inquiry have acted manifestly unfair and have thereby denied the detained the full and fair hearing to which he was and is entitled.

XI.

That the detained is in detention, as aforesaid, and for said reason is unable to verify this petition; that your petitioner, in behalf of the detained and in his own behalf, verifies this petition, but for and as the act of the detained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner of [10] Immigration commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of her detention, so that the same may be inquired into, to the end that the said detained may be restored to her liberty and go hence without day.

Dated at San Francisco, California, February 23, 1932.

STEPHEN M. WHITE,
Attorney for Petitioner. [11]

United States of America,
State of California,
City and County of San Francisco.—ss.

Kwan Tow, being first duly sworn, deposes and states as follows:

That your affiant is the petitioner in the foregoing petition; that the same has been read and

explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief; and as to those matters he believes it to be true.

GWAN TOW.

Subscribed and sworn to before me this 23rd day of February, 1932.

[Seal] STEPHEN M. WHITE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 24, 1932. Walter B. Maling, Clerk. [12]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the verified petition on file herein.

IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the Port of San Francisco, appear before this Court on the 21st day of March, 1932, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of the petition and said order be served upon the United States Attorney for this District, his representative herein.

AND IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of the said Commissioner, or the Secretary of Labor, shall have the custody of the said Ngai Gwan Ying, or the Master of any steamer upon which she may have been placed for deportation by the said Commissioner, are hereby ordered and directed to retain the said Ngai Kwan Ying, within the custody of the said Commissioner of Immigration, and within the jurisdiction of this Court until its further order herein.

Dated at San Francisco, California, February 23rd, 1932.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Feb. 24, 1932. Walter B. Maling, Clerk. [13]

FINDINGS AND DECISIONS OF BOARD OF SPECIAL INQUIRY.

31167/7-12 January 13th, 1932.

Summary.

BY CHAIRMAN:

The applicant Ngai Kwan Ying, seeks admission as the lawful wife of Kwan Tow, an alleged domiciled merchant of Modesto, California, whose status as such was conceded by this service when Form 632 was granted him January 22, 1931. Although,

in my opinion, there is evidence strongly indicative that the original admission of this Chinese was secured through fraud, I believe, in view of the department's action in May, 1931, in sustaining the appeal of an alleged brother, Kwan Moon, in whose case the same feature was at issue, that the Board should concede the exempt status of the alleged husband in the present matter. Applicant is said to have married Kwan Tow according to Chinese custom at the Ping Kai Village, Far Yuen District, China, on April 6, 1931, she being the second wife claimed by [14] this Chinese. It is alleged his first wife died in China CR 14-9-9 (Oct. 26, 1925). No proof of the death of the alleged wife (1st), other than the statement of the principals at this time has been submitted. The testimony of Kwan Moon in March, 1931, would indicate that Kwan Tow's first wife was still living at that time.

The evidence submitted comprises the testimony of the two principals and that of an identifying witness, Au Yeung Shee, a group photograph of the principals, and five of the usual Chinese red marriage papers. With one notable exception, statements which do not involve the identifying witness are in good agreement. That portion of the testimony which concerns the identifying witness is in serious disagreement and it is very obvious that the same is false. The present testimony is in radical disagreement with that of the alleged brother Kwan Moon on all his appearances before this Service.

Ping Kai Village on this occasion. He states they each went alone to applicant's village, she going first and having already arrived there before he himself got there and that he came home first. Applicant testifies that on this occasion she and her husband left their home in Ping Kai Village together, travelled the entire distance to her parents' home in Sing Ngai Village together, left the latter place together, and walked together the entire distance on the return to the Ping Kai Village.

It is claimed that Au Yeung Shee first met the applicant when she attended the latter's wedding feast on April 7, 1931, at the Ping Kai Village and that the two met on only one other occasion, this being on October 15, 1931, in a hotel in Canton City. The witness claims to be the mother of three children, a boy aged 11, and a girl aged 8, both born in this country, and another boy born in China CR-20-4-15 (May 31, 1931). Only the oldest boy accompanied her when she returned to this country last November. The witness claims to have lived during her recent visit to China in Ping Sung Village, about 11 or 12 lis distant from the Ping Kai Village, she claims she made a trip both ways on foot from her own village to the Ping Kai Village when she attended the applicant's wedding feast, being about 8 months advanced in pregnancy at the time. She testifies that her two children accompanied her to the applicant's wedding feast last April, but that neither her daughter nor her youngest son was with her when she met the applicant and Kwan Tow in

Canton City, she herself being en route to the U. S. at that time with her oldest son. Alleged husband also testifies that the witness was accompanied only by her oldest son at the time of the meeting in Canton City and states that he has never seen the child of the witness who was born in China last year. Au Yeung Shee states that the applicant has never seen her youngest son and does not know whether or not applicant has seen her daughter, although the daughter was with her at the wedding feast. Applicant testifies she has met all three children of Au Yeung Shee, that all three children were with the witness when she met her in Canton City last October. She states she does not know whether or not any of the children were with their mother when she attended the wedding feast in April, but is quite positive in her statement that all three were with the mother when they met at the hotel in Canton City. She further states that the youngest son, whose name and birthdate she gives in agreement with Au Yeung Shee, was carried by the latter in her arms when they met in Canton City last October.

Au Yeung Shee testifies that when she left the hotel where they had all been stopping in Canton City neither Kwan Tow nor the applicant accompanied her away from the hotel, that they were both still at the hotel when she left there. Kwan Tow testifies that when Au Yeung Shee left the hotel en route to Hongkong, he accompanied her from the hotel to the boat which she boarded in

Canton City. Applicant states she does not know whether or not her husband accompanied the witness when the latter left the hotel. [16]

Au Yeung Shee testifies that the ancestral hall in which the wedding feast was held contained two kitchens, one on either side of the front entrance of that building. The alleged husband testifies that this ancestral hall had no kitchens nor any spaces provided to serve as kitchens. The applicant is not sure whether or not the ancestral hall has any kitchens, stating she has been in that building only on the one occasion.

As will be seen from the diagrams prepared by the principals (Exhibits "G" and "H") it is claimed their village in China contains but four dwelling houses, the ancestral hall already mentioned, and five small houses, one in back of each of the five larger structures. According to the claims, the entire village is occupied by Kwan Tow and his brothers. Kwan Tow testifies that the ten structures he describes have been in his village as far back as he can remember, that the five large houses are all of the same size and that the five small buildings are all of the same size and style. He states that his mother always occupied the first dwelling at the north, that he himself has always occupied the second house from the north since his first mariage, that Kwan Lau has always occupied the third house from the north since his marriage, and that Kwan Moon since his marriage has always

occupied the 4th house from the north. Last March Kwan Moon made a diagram of this village (Exhibit "A", file 12017/41432) in which he gave the same arrangement of the large house but places his own house as the first to the north and his mother's house as the one next to the ancestral hall, the second from the north. In this diagram he agrees with the statements in the present case as to the houses occupied by Kwan Tow and Kwan Lau. However, he stated this arrangement was not correct and made another diagram (Exhibit "B" in same file) in which he places the ancestral hall as the first house at the north, his mother's house as the 2nd house from the north, retaining Kwan Lau in the third house, places Kwan Tow in the 4th, and himself in the 5th house from the south. He testified that this arrangement represented the true condition of his village. When he was an applicant for admission in 1923 Kwan Moon testified that the family of his brother Kwan Lau occupied the second house from the north and that the family of his brother Kwan Tow occupied the third house from the north. He was the only one who testified as to the conditions in his village on that occasion, although Kwan Tow appeared as a witness in that case. In the case of Kwan Lau in Nov., 1922, he and the present alleged husband had agreed that the latter occupied the second house and the former the third house from the north. Both Kwan Lau and Kwan Moon have testified that there are but four small houses in the village, one in back of each

of the dwelling houses, and that there is no such house back of the ancestral hall. It will be seen that Kwan Moon carries this out in both of his diagrams. Kwan Tow, as previously indicated, states the building back of the ancestral hall has always been there and is the same in size and appearance as the other four small houses. It might be noted at this time that the alleged father of these three Chinese is See Yip man, claiming to come from the Hoy Ping district and speaking the dialect of that district. His three alleged sons are all Sam Yup men. They explain this by claiming to have been taken to the Far Yuen District, where the Sam Yup dialect is spoken, by their mother after the alleged father left China in 1908. The latter claims he has never been in this village in which his alleged family lives. Kwan Tow is not very clear in his statements as to what use was made of the extra buildings [17] before he and his alleged brothers were married.

Kwan Moon was denied the return privilege in 1929 because it appeared that he was in reality a Gong family man rather than a member of the Kwan family, under which name he gained admission. It developed that he was known by his associates as a Gong man, and his statements in this regard were so conflicting that there could be little doubt but that he had assumed the name of Kwan to accomplish his admission to the U. S. It was shown that he was known as Gong Chew Ling. His final claim was that, with the addition of the family name "Kwan", this represented his marriage name;

in other words, his marriage name is Kwan Gong Chew Ling. If this were true it would be a most unusual departure from the custom of having three characters in the marriage name. Kwan Tow states that Kwan Moon's marriage name is Kwan Gong Chew. Here the character "Ling" is dropped and the family name "Kwan" added, conforming to the customary three character name. It appears from the testimony that the surrounding villages are all Gong family villages and that his family is the only one belonging to the Kwan clan in the vicinity. The fact that the three alleged brothers fail to agree among themselves concerning the number and the arrangements of the houses comprising their very small village, and as to which of the four dwellings they individually occupy, is, in my opinion, proof that the village is simply a fabrication prepared for use before this service.

It is claimed that Kwan Tow and the applicant have cohabited as man and wife since their marriage in April of last year. They state they have had no children and that applicant is not an expectant mother at this time.

In view of his previous record before this Service, it is my opinion that we cannot consistently regard Kwan Tow's statements in the present matter as worthy of credence. It is also apparent that the applicant's testimony is, at least in part, fabricated and untrue. The so-called marriage papers presented have no official significance and can

easily be secured in a fraudulent case as in one bona fide in character—witness the presentation of such papers by Chan Shee or Wong Shee, alleged mother of Kwan Tow. The photograph submitted is no proof that the persons appearing in it are lawfully married. We must also bear in mind that Kwan Tow is known to have been involved in an attempt to import Chinese women into this country by fraudulent means, one of these women known to have lived an immoral life here previously.

In my opinion, the evidence submitted does not satisfactorily establish that the applicant is the lawful wife of an exempt Chinese. No evidence is submitted indicating her to be admissible under any other status, and I accordingly move that she be denied admission to the U. S., on the ground that she is an alien ineligible to citizenship, who is not excepted under any of the provisions of Section 13 (c) of the Immigration Act of 1924, the burden of proof not being sustained as required by Section 23 of said Act.

By Member GOSS.—I second the motion.

By Member GOURSELL.—I concur.

[Endorsed]: Filed Feb. 24, 1932. Walter B. Maling, Clerk. [18]

[Title of Court and Cause.]

NOTICE OF FILING OF FINDINGS AND DECISION OF SECRETARY OF LABOR.

To John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, Respondent herein, and to George J. Hatfield, United States Attorney, his attorney:

You and each of you will please take notice that the petitioner herein files herewith under Exhibit "B," as part and parcel of his petition for a writ of habeas corpus and with the same force and effect as if set forth in full in said petition, a copy of the findings and decision of the Secretary of Labor, through his Board of Review, denying the application for admission to the United States of the detained herein.

Dated this 19th day of July, 1932.

STEPHEN M. WHITE,
Attorney for Petitioner. [19]

PETITIONER'S EXHIBIT "B".

FINDINGS AND DECISION OF SECRETARY OF LABOR, THRU BOARD OF REVIEW.

55807/428 February 10, 1932.
San Francisco.

In Re: Ngai Kwan Ying, age 17.

This case comes on appeal from denial of admission as the wife of a Chinese merchant. The relationship is at issue.

Board: Winings, Tetlow, McNeal, Ebey and Ward.

Attorney Roger O'Donnell has been heard and filed a brief.

The alleged husband who went to China in January, 1931, returned on the same ship with the applicant and an alleged acquaintance, who claims to have attended the applicant's wedding, have testified. The record shows such adverse features as the following:

There are discrepancies in the testimony as to whether the applicant and her alleged husband went together or separately to visit her parents and between the applicant and both of her witnesses as to whether the identifying witness had her three children with her when they met in Hongkong. There is also inconsistency between the description of the alleged husband's home village as given in the present testimony and that which has heretofore been given by the alleged brothers of the alleged husband.

However, the outstanding adverse feature in the case is the fact that the alleged husband's record shows him to be deserving of no credence as a witness and the record of the identifying witness indicates that she has small regard for the truth.

In 1923, the alleged husband and his alleged father appeared to testify on behalf of a woman and girl claimed by this alleged husband to be his mother and sister. This woman when confronted

with her own previous record confessed that she was not the wife of this alleged husband's father nor the mother of the girl who accompanied her and admitted that she was identical with a woman who had previously been deported from the United States as a prostitute. This alleged husband unquestionably gave false testimony in connection with that application in 1923 and in the present case has repeated the false testimony with regard to his mother and sister.

The identifying witness in connection with her own application for admission as a returning laborer at San Francisco in November, 1931, appears to have made false statements regarding the disposal of the property upon which her laborer's return certificate had been issued.

A photograph of this applicant and her alleged husband taken [20] in China and the so-called three generation papers frequently presented in these cases and have been placed in evidence. The photograph obviously does not prove that the persons pictured in it are husband and wife and it is to be noted that in the fraudulent case of the alleged husband's alleged mother's attempt to enter in 1923 similar three generation papers were presented.

In view particularly of the discrediting records of both of the applicant's witnesses, it is not believed that the evidence satisfactorily or reasonably establishes that she is the wife of her alleged husband.

It is, therefore, recommended that the appeal be dismissed.

W. W. SMELSER,
Assistant to the Secretary.

Service and receipt of copy of the within Notice and Exhibit is hereby admitted this 20th day of July, 1932.

GEO. J. HATFIELD,
Attorney for Respondent.

[Endorsed]: Filed Jul. 20, 1932. Walter B. Maling, Clerk. [21]

[Title of Court and Cause.]

APPEARANCE OF RESPONDENT AND NOTICE OF FILING EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

To the petitioner in the above entitled matter, and to Stephen M. White, his attorney:

Please take notice that the respondent hereby appears in the above entitled matter and will, upon the hearing of the order to show cause, rely upon certain excerpts of testimony from the original immigration record additional to the portions of such records which are set out in the petition for writ of habeas corpus herein, a copy of such additional

excerpts being annexed hereto. Please examine same prior to the hearing on the order to show cause.

Dated, Apr. 11th, 1932.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Respondent. [22]

[Title of Court and Cause.]

RESPONDENT'S MEMORANDUM OF EXCERPTS OF TESTIMONY FROM THE ORIGINAL IMMIGRATION RECORD.

The witnesses herein are:

NGAI KWAI YING, the applicant, who claims to be nearly 18 years old, and who has never been in the United States.

KWAN TOW, alleged husband of the applicant, age 29, who first came to the United States in 1921 and was back in China from January, 1931, to December, 1931.

AU YEUNG SHEE, identifying witness, age 28, who first came to the United States in December, 1920, and was back in China from December, 1930, to November, 1931.

The applicant has been denied admission into the United States on the ground that she has failed to satisfactorily establish that she is the wife of Kwan Tow.

There is set forth below from the original immigration record some of the conflicting testimony:

I.

KWAN TOW testified in connection with the applications of Wong Shee and Quon Yit Gew on September 27, 1923, as follows:

"Q. What are your names?

A. Kwan Too; Kwan How Bar; no other name.

* * * * * * *

Q. For what purpose do you appear here today?

A. For my mother and my sister.

Q. Whose photograph is this (showing photograph of Wong Shee, applicant 10-14)?

A. That is my mother.

Q. Are you sure that is your mother?

A. Yes.

Q. Is that woman your natural mother?

A. Yes.

Q. Whose photograph is this (showing photograph of applicant 10-15)?

A. That is my sister.

Q. Are you sure that is your sister? [23]

A. Yes.

Q. Is she your full blood sister?

A. Yes."

(Immigration Record No. 22447/10-14, pp. 31, 30).

KWAN TOW testified on September 28, 1923, as follows:

"Q. Had your mother, Wong Shee, ever been away from home at any time prior to your departure for this country in 1921?

A. No.

Q. Has your mother ever been in this country before?

A. No.

Q. This woman, Wong Shee, whom you claim is your mother was landed at this port in 1913 as the wife of a Yee Chung Sing, the following year she was arrested as a prostitute and was finally deported as such in 1918. What have you to say to that?

A. That is not so.

Q. Her identification as being the woman so landed and arrested and deported is complete. There is no question about it. I am showing you the photograph of the woman who was landed in 1913 and who was arrested as a prostitute and deported in 1918 you can see by those pictures they are Wong Shee.

A. No, that is not my mother.

Q. Is this woman Wong Shee who is applying your mother?

A. Yes.

Q. That is the same woman who was admitted here in 1913 and deported in 1918.

A. That picture is not of my mother.

(Testimony of Kwan Tow.)

Q. You are lending assistance to land in this country a prostitute. That is a mighty serious thing against you. I want you to tell the truth of this whole matter.

A. This woman coming here is my mother.

Q. She can't be your mother. I have already told you that.

A. This photograph is not of my mother (indicating photo of Chen Yung Fung).

Q. Is this Quon Yit Gew your sister?

A. Yes.

Q. She couldn't even identify you.

A. I don't know why.

Q. Isn't the reason she could not identify you because she had never seen you before in her life?

A. She saw me before, I am her brother." (Id. p. 16).

KWAN TOW testified in connection with the present application on January 13, 1932, as follows:

"Q. What are all your names?

A. Kwan Tow and Kwan How Baw and Kwan Gong Tow, no other names."

* * * * * * *

"Q. What are the name, age and whereabouts of your father?

A. Kwan Chong and Kwan Sung Jew, 50 years old, now in Stockton, Calif.

* * * * * * *

(Testimony of Kwan Tow.)

Q. How many times has your father ever married?

A. Only once. [24]

Q. What was your mother's name and when and where did she die?

A. Wong Shee; she died in CR-20-2-12 (new calendar or Feb. 12, 1931) in Ping Hai Village, F. Y. D., China.

Q. Was your mother ever in the U. S.?

A. Yes, but she was deported.

* * * * * * *

Q. How many children has your mother ever had?

A. Three sons, one daughter.

Q. Describe your brothers and sisters?

A. Kwan Low (Lau) 32 years old, now in Modesto, Calif.; Kwan Moon, 29 years old, now in Ping Kai Village. Sister: Kwan Yit Gew, 27 years old, married and now living in the Straits Settlements.

* * * * * * *

Q. When did your sister go to the Straits Settlements?

A. I do not know; I think she went shortly after her marriage in CR-15-10-10 (Nov. 14, 1926)."

(Immig. Record #55807/428, pp. 12, 13 and 14).

KWAN TOW testified on January 14, 1932, as follows:

"Q. When did your sister marry?

A. In CR-15-10-10 (Nov. 14, 1926).

Q. How did you learn of your sister's marriage?

A. My mother wrote to my father about her marriage and my father told me.

Q. In March 1931, your alleged brother, Kwan Moon, testified that his sister was not married and that she was then living in the Ping Kai Village.

A. I do not think he learned about the marriage of my sister.

* * * * * * *

Q. (showing photo of Wong Shee, taken at this Station, and contained in File No. 22447/10-14). Whom does this photograph represent?

A. That looks like my mother.

Q. (showing photographs attached to affidavits of Kwan Chong, dated March 3, 1923, contained in the same file). Whom do these photographs represent?

A. They are of my father and my mother.

Q. Did you testify in behalf of this woman when she applied for admission in CR-12 (1923)?

A. Yes.

Q. Bearing in mind that you are testifying under oath, do you state that this woman whose photograph you have just identified as that of

(Testimony of Kwan Tow.)

your mother, and for whom you testified in CR-12 (1923), is actually your blood mother?

A. Yes.

Q. This woman, Wong Shee, has confessed that she is not the wife of your alleged father, and that she never saw your father before she came to this country in CR-12 (1923). She has also admitted that she is the same person, who is known to this Service as Chan Shee, the wife of a Yee family man, and who was deported from this country in CR-1 (1912) or (1913). Have you any explanation to offer?

A. She is really my mother. I do not know why she testified as she did. [25]

Q. (showing photograph of Kuon Yit Gew, taken at this Station and contained in File No. 22447/10-15). Whom does this photograph represent?

A. That is my sister, Kwan Yit Gew.

Q. You are advised that the woman you claim as your mother has stated that the girl represented by this photograph and who accompanied her to this country in CR-12 (1923), was not her daughter. What have you to say about that?

A. (after hesitation). I do not know why she should have testified to that effect. Kwan Yit Gew is my sister and the daughter of this woman, Wong Shee.

Q. How do you explain the fact that when you were brought before this girl, whom you

(Testimony of Kwan Tow.)

claim as your sister, in CR-12 (1923), she stated she had never seen you before nor knew who you were, although you claim to have been living in the same house with her two years previous to that time?

A. I do not know why. I think she is slightly off her head.

Q. Our records show that you have previously given false and perjured testimony before this Service, furthering an attempt to import Chinese women to this country for immoral purposes. Can you give any reason why this Board should consider you a credible witness in the present matter?

A. The Applicant is really my wife. I would not use my wife for immoral purposes."

(Id. pp. 24 and 25).

QUON YIT GEW testified on September 27, 1923, as follows:

"Q. What is your name, age, date and place of birth?

A. Quon Yit Gew; no other name, 18 years old; born KS 32-9-15 (Nov. 1, 1906) at Ngow Yee Fong Place in Hongkong.

* * * * * * *

Q. What name is your father known by?

A. Kwan Chong and Kwan Sung Jew."

(Immig. Record #22447/10-14, p. 24).

(Testimony of Quon Yit Gew.)

To applicant (indicating in person alleged father who is brought into room). A. That is by 2nd brother Kwan Too.

Q. You are having full opportunity to look at the person appearing before you and I will ask you again as to who this person is standing before you?

A. My 2nd brother Kwan Too.

Q. Are you sure of that?

A. Yes.

Q. Alleged father excused from room.

Q. Who is this (indicating alleged brother Kwan Too in person)?

A. I can't identify this man.

Q. Does he resemble anyone with whom you are acquainted?

A. No.

Q. You have had full opportunity here to examine this man and I will ask you again who this person is?

A. I don't know.

Q. Did you ever see him before in your life?

A. No."

(Id. p. 21). [26]

Miss KATHERINE R. MAURER testified on September 27, 1923, as follows:

"Q. State your name and profession.

A. Katherine R. Maurer, deaconess of the Methodist Episcopal Church, 655 Stockton St.

(Testimony of Miss Katherine M. Maurer.)

Q. Do you recognize this Chinese woman (indicating applicant 10-14) in person?

A. Yes I do.

Q. When did you first see her and where?

A. Several years ago at the Immigration Station at Angel Island.

Q. Was she an applicant for admission at that time or was she held on account of an arrest case?

A. She was under arrest at that time I think and she was not very well at that time, we had her in our home about a year I think. I remember taking her to court one morning. It is considerably over a year she was with us.

Q. Is there any question, Miss Maurer, as to this woman (indicating applicant 10-14) as to this woman being the woman held at this place and the woman who was paroled at your home?

A. No question. I am really very fond of her; she is a nice girl and was not very well and she still has that little cough.

Q. Did you converse with her frequently while she was at the island several years ago and while she was at the island?

A. Yes, and because she wasn't well I think that is one reason she was paroled.

Q. Do you know what became of her?

A. I believe she was to be married but permission was not given. I never learned why

(Testimony of Miss Katherine M. Maurer.)

she was not married. She was deported and sent back."

(Id. pp. 19 and 18).

WONG SHEE testified on October 22, 1923, as follows:

"Q. What is your name?

A. Wong Shee.

Q. What is your true name?

A. Chan Gum Fung.

Q. Are you the same woman who was admitted at this Port in 1913 as the wife of one Yee Chung Sing, a citizen, you having been admitted at that time under the name of Chan Shee?

A. Yes.

Q. Whose photograph is this (showing photograph of Chan Shee attached to request for photograph by Inspector J. H. McCall dated February 5, 1913, in file 12505/10-6)?

A. That is my photograph.

Q. Are you the identical woman who was arrested in 1914 as a prostitute and who was finally deported in 1918?

A. Yes, but I could not remember what the dates were but I did stay here 2½ years at this station and I was afterwards paroled to the M. E. Mission in San Francisco. It has been so long ago I don't remember the name of the street.

(Testimony of Wong Shee.)

Q. Whose photograph is this (showing photograph of Chan Gum Fung attached to arrest file 12020/497)?

A. That is my photograph.

Q. Is Kwan Chong (showing photograph of alleged husband) really your husband?

A. No.

Q. Had you ever seen that man prior to the day I brought him into your presence the day of your examination on September 27th last? [27]

A. That was the first time I had ever seen him.

Q. Have you ever been married?

A. No.

Q. Is applicant Quon Yit Gew your daughter?

A. The paper says she is.

Q. Yes that is what the paper says but tell me the truth of the matter; is she your daughter?

A. No, she is not my daughter.

Q. This is the girl I have in mind (showing photograph of applicant 10-15); is this girl your daughter?

A. The paper says she is but she is not my daughter."

(Id. p. 49).

KWAN MOON testified in connection with his own application on March 11, 1931, as follows:

"Q. What are all your names?

A. Kwan Moon. That is the only name I have."

(Immig. Record #12017/41432, p. 3).

"Q. Are your parents living?

A. Both living."

(Id. p. 5).

"Q. What is your mother's name, age and where is she?

A. Wong Shee, 49, unbound feet, and living in Ping Kai Jung village, China."

(Id. p. 6).

"Q. What is the name of your sister and where is she?

A. Kan Yut Gue, she is in Ping Kai Jong. She is 26 years old.

Q. Has she ever been married?

A. No."

(Id. p. 7).

II.

AU YEUNG SHEE testified in connection with her own application on November 23, 1931, as follows:

"Q. What are all your names?

A. Au Yeung Shee; no others."

(Immig. Record #31038/2-1, p. 6).

(Testimony of Au Yeung Shee.)

"Q. Upon what was your application for a Laborer's Return Certificate based?

A. On the ground that I had $1,000.00 in the bank.

Q. Have you withdrawn any portion of that money since you filed your application for Laborer's Return Certificate in 1930?

A. No.

* * * * * * *

Q. Have you given a promissory note to the Bank of America, Stockton, for any money you may have borrowed from it?

A. No.

Q. Have you borrowed any money from the Bank of America, Stockton, Calif., using your savings account as collateral?

A. No.

Q. Have you guaranteed the note of any other person pledging your savings account in the Bank of America, Stockton, Calif., as collateral?

A. No.

Q. Have you affixed your name to any note of any kind [28] within the last 18 months?

A. No.

* * * * * * *

Q. Are we to understand that you wish to be understood as stating that you may have signed a note without knowledge of what you were doing?

(Testimony of Au Yeung Shee.)

A. No. I wish it to be understood that when I went to the bank to open an account I signed something, but after that I did not sign again.

Q. Did you ever at any time sign a note as guarantor for its payment?

A. No."

(Id. p. 7.)

"Q. You were previously asked if you had given a promissory note to the Bank of America at Stockton, and stated 'No.' Was that answer correct?

A. That was correct.

Q. Isn't it a fact that shortly before you last departed for China you and your husband jointly signed a note for $800.00 which you borrowed from the Bank of America at Stockton?

A. I do not remember.

Q. Where did your husband obtain the money to pay the expenses of your trip to China?

A. My husband was in business, so he got the money.

Q. Your husband states that he told you that he had to take a loan of $800.00 from the Bank of America, Stockton, and that you and he both signed such note. Is he correct?

A. I do not remember.

Q. According to the testimony of your husband you and he went to the Bank of America

(Testimony of Au Yeung Shee.)

and signed a note for $800.00 shortly before you left for China. Is he telling the truth?

A. Yes, I did sign a note in the bank."

(Id. pp. 10 & 11.)

AU YEUNG SHEE testified on November 25, 1931, as follows:

"Q. On Nov. 24, 1930, the day you deposited $800.00 in the Bank of America, Stockton, did you make an application for a loan of $800.00 from that bank?

A. No.

Q. It is evident that you are not testifying truthfully. Why don't you do so?

A. I don't know of any occurrence of that kind.

Q. (Showing Bank of America note in the sum of $800.00, #37,145, dated Nov. 24, 1930.) Is that your signature (Au Yuen)?

A. Yes.

Q. That signature is signed to a note in the sum of $800.00. Why did you deny knowledge of such a note?

A. That is my signature, but I don't know how it was transacted."

(Id. p. 15.)

LEONG POY, alleged husband of Au Yeung Shee, testified on November 23, 1931, as follows:

"Q. What are all your names?

A. Leong Poy, Leong Gong Kay. That is all. And sometimes people call me Geo. Leong.

* * * * * * *

[29]

Q. Has your wife borrowed any money from the Bank of America, Stockton, Calif., using her savings account as collateral?

A. No."

(Id. p. 8.)

"Q. Since your wife has had a savings account in the Bank of America, Stockton, Calif., has she at any time borrowed money from the bank and pledging her savings account as collateral for such loan?

A. No.

* * * * * * *

Q. You are advised that the bank authorities at the Bank of America, Stockton, have stated that your wife has guaranteed the payment of a note for $850.00. Don't you know anything about that?

A. No.

Q. Is it possible that your wife could have guaranteed such a note without your knowledge?

A. Yes, she guaranteed a note for me for $800.00.

Q. When?

(Testimony of Leong Poy.)

A. At the end of last year when she departed from this country.

Q. What became of that note?

A. I paid that note to the bank.

Q. When did you pay the note to the bank?

A. A little over one month ago.

Q. Your wife left for China on Dec. 20, 1930. How long before that departure took place was it that she made this note?

A. A little over one week.

Q. Have you any evidence of the fact that your wife did make that note in your behalf?

A. Well, the bank returned the note to me and I left it in Stockton.

Q. Have you the note in Stockton at this time?

A. Yes.

Q. Where is it?

A. In my safe.

Q. It could be produced before this Board then for consideration?

A. Yes.

Q. Your wife made the note payable to you —drew the note in your favor?

A. No, I secured a loan from the bank and gave my property as security, but the bank required that my wife sign the note for the loan with me as under the California laws if anything should happen to me my wife is entitled to one-half the property that I own.

(Testimony of Leong Poy.)

Q. What did you do with the $800.00?

A. To pay my property tax.

Q. Then the bank actually let you have the $800.00?

A. Yes.

Q. And you repaid how much to the bank about one month ago?

A. $840.00 odd.

Q. Do you know of any other note that your wife may have attached her name to which would use the savings account of Au Yuen as collateral?

A. No.

Q. Your wife will understand this will she not?

A. Yes.

Q. Did she sign that note that you gave to the bank in her own handwriting?

A. Yes, in her own handwriting.

Q. But your wife has stated already that she has not affixed her name to any note of any kind within [30] the last 18 months?

A. Yes. She did.

Q. Did you explain to your wife that the note that you were giving to the bank for $800.00 was money which you needed to pay your property tax, and the bank would not let you have that amount unless she signed your note?

A. No, I did not.

(Testimony of Leong Poy.)

Q. Well, what makes you think that your wife will know about this then?

A. Well, I told my wife that I had to take a loan of $800.00 from the bank to pay her expenses and those of the children to go to China and my wife told me that I could use her bank book as security for the loan.

Q. Does the note which you state you have in your safe in Stockton show that your property is used as the basis for the loan of $800.00?

A. No, the note shows only this bank book used as a security because I had taken a loan for $11,000.00 on my property and that loan did not become due until April or May of this year, so I could not use my property as a security for the $800.00 loan just mentioned.

Q. Then in so far as this $800.00 note is concerned the bank account of your wife was used as collateral?

A. Yes.

Q. Is the statement which you have made regarding this matter a true statement in all respects?

A. Yes, a true statement.

Q. Was that note for $800.00 made out in your name or in your wife's name or in both your names?

A. In both my name and my wife's name."

(Id. pp. 9 and 10.)

LEONG POY testified on November 24, 1931, as follows:

"Q. You stated yesterday that you and your wife repaid the $800.00 which you owed the Bank of America, Stockton, about one month ago. Was that correct?

A. That money was paid back to the bank last Saturday.

* * * * * * *

Q. And the note was not repaid until after your wife's return to this port on Nov. 17th last. Is that correct?

A. Yes."

(Id. p. 14.)

III.

KWAN TOW testified in the present case on January 13, 1932, as follows:

"Q. Have you ever had more than the two wives you have mentioned before this Service?

A. No.

Q. Is your first wife still living?

A. No.

Q. When and where did she die?

A. CR-14-9-9 (Oct. 26, 1925 at Ping Kai Village.

Q. Can you furnish proof that your first wife is not living?

A. No."

(Testimony of Kwan Tow.)

(Immig. Record #55807/428, p. 14.)

"Q. When did you marry this Applicant?

A. April 6, 1931."

(Id. p. 15.) [31]

KWAN MOON testified in connection with his own application on March 11, 1931, as follows:

"Q. How many times has your brother Kwan Ton been married?

A. Once only.

Q. When, where and to whom was he married?

A. C. R. 7 (1918). I have forgotten the date. Married to Wong Shee at Ping Kai Jong Village.

Q. Are you sure that the wife of Kwan Tow is Wong Shee?

A. Yes."

(Immig. Record #12017/41432, p. 6.)

IV.

KWAN TOW testified in the present case on January 13, 1932, as follows:

"Q. From what place does the Applicant come?

A. Sing Ngai Village, Fyd, China.

(Testimony of Kwan Tow.)

Q. Have you ever been to the Sing Ngai Village?

A. Yes, once.

* * * * * * *

Q. When did your visit to the Applicant's native village occur?

A. CR-20-10-5, old calendar (Nov. 14, 1931).

Q. Did you go there in company with the Applicant?

A. No. Each of us went alone. We went there on the occasion when my wife's brother had an engagement party.

Q. Did you both go on the same day?

A. Yes.

Q. Who went first?

A. She went first. At the time I arrived she was already there.

Q. Did you and the Applicant return to the Ping Kai Village together from that visit?

A. No, I came home first."

(Immig. Record #55807/428, p. 15.)

NGAI KWAN YING testified in the present case on January 14, 1932, as follows:

"Q. How many times did your husband visit the home of your family?

A. Once.

Q. When did that visit occur?

(Testimony of Ngai Kwan Ying.)

A. He went there in CR-20-10-5 (Nov. 14, 1931), on the day of my brother's betrothal.

* * * * * * *

Q. Did your husband accompany you to your parents' home in CR-20-10-5 (Nov. 14, 1931)?

A. Yes. He and I walked there together.

Q. Did you and your husband leave your home in Ping Kai Village together and arrive at your parents' home in Sing Ngai Village together?

A. Yes.

Q. Did you remain overnight at your parents' home in CR-20-10-5 (Nov. 14, 1931)?

A. No.

Q. Did your husband also accompany you on your return to the Ping Kai Village on that occasion?

A. Yes.

Q. Did you both walk together on the return to the [32] Ping Kai Village?

A. Yes."

(Id. p. 28.)

V.

KWAN TOW testified in the present case on January 13, 1932, as follows:

"Q. Did you meet Au Yeung Shee on other occasions in China than at the time of your wedding?

A. I saw her once again at Canton City while my wife and I were living in the Man On Jan Hotel. She was then on her way to the U. S.

Q. Did your wife also meet her on that occasion?

A. Yes.

* * * * * * *

Q. Do you know what family the witness, Au Yeung Shee, has?

A. She has two sons and one daughter.

Q. Have you met all these children?

A. All except the youngest, which is a son."

(Id. p. 20.)

KWAN TOW testified in the present case on January 14, 1932, as follows:

"Q. Did anyone accompany the witness when she came to the Man On Hotel in Canton City?

A. Yes, her son and a man by the name of Gong Lin Fay.

Q. Did the witness ever visit your room at the Man On Hotel?

A. Yes."

(Id. p. 24.)

NGAI KWAN YING testified in the present case on January 14, 1932, as follows:

"Q. How did you become acquainted with Au Yeung Shee?

A. She attended the banquent when I was married. That was the first time I ever saw her.

* * * * * * *

Q. Do you know if she has any children?

A. Yes, she has two sons and one daughter.

Q. Have you met her children?

A. Yes, all of them.

Q. Describe the children of Au Yeung Shee?

A. The oldest son is Leung Gong Yut, about 11 or 12 years old, and Leung Gong Sing, he was only born in the 4th month, 15th day of this year (May 31, 1931). Daughter is Leung Gong Ho, about 7 or 8 years old.

* * * * * * *

Q. Where is it you met these children of Au Yeung Shee?

A. I met her children in Canton City in CR-20-9-5, old calendar, (Oct. 15, or 16, 1931), in Canton City, while they were enroute to Hongkong, and the U. S.

Q. How does it happen you recall the birth-date of the witness' son, Leung Gong Sing?

A. I heard his mother mention the date.

Q. Did she carry this child in her arms when you met her in the 9th month of this year (Oct. 1931) in [33] Canton?

(Testimony of Ngai Kwan Ying.)

A. Yes.

Q. Whereabouts in Canton City did you meet Au Yeung Shee and her three children?

A. At the Man On Jan Hotel, where she also stayed.

Q. Was Au Yeung Shee stopping at that hotel before you and your husband arrived there?

A. No. We arrived there in CR-20-8-21 (Oct. 2, 1931).

Q. On what floor of the hotel was your room located?

A. On the third floor.

Q. Did Au Yeung Shee and her children visit your room at the hotel?

A. Yes. Her room was right next door.

Q. How long did Au Yeung Shee stop in that hotel on that occasion?

A. Only one night?

* * * * * * *

Q. Are the two occasions you have described the only time you have ever seen Au Yeung Shee?

A. Yes.

Q. And the one occasion you saw her at the Man On Hotel in Canton City is the only time you ever saw Au Yeung Shee's three children?

A. That is all I can remember."

(Id. pp. 32 and 33.)

AU YEUNG SHEE testified in the present case on January 14, 1932, as follows:

"Q. While you were in Canton City enroute to the U. S., upon the occasion you met Kwan Tow and his wife there, was your daughter with you at any time?

A. No.

Q. Was your youngest son with you there at any time during that occasion?

A. No.

Q. Has this applicant ever seen your youngest son?

A. No."

(Id. p. 33.)

.....

United States Attorney, Attorney for Respondent.

[Endorsed]: Filed Apr. 11, 1932. W. B. Maling, Clerk. [34]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the court room thereof, in the City and County of San Francisco, on Saturday, the 30th day of July, in the year of our Lord one thousand nine hundred and thirty-two.

Present: the Honorable HAROLD LOUDERBACK, District Judge.

[Title of Court and Cause.]

The petition for a writ of habeas corpus, having heretofore been submitted, now being fully considered, it is ordered that the said petition be and the same is hereby denied. [35]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the above-entitled Court, to John D. Nagle, Commissioner of Immigration, and to George J. Hatfield, Esq., United States Attorney, his attorney:

You and each of you will please take notice that Kwan Tow, the petitioner in the above entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein on July 30, 1932, denying the petition for a writ of habeas corpus filed herein.

Dated this 4th day of August, 1932.

STEPHEN M. WHITE,
Attorney for Appellant. [36]

PETITION FOR APPEAL.

Comes now Kwan Tow, the petitioner in the above entitled matter, through his attorney, Stephen M. White, Esq., and respectfully shows:

That on the 30th day of July, 1932, the above-entitled Court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, the appellant prays that an appeal may be granted in her behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors as complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the Praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof, and further, that the said appellant be held within the jurisdiction of this Court during the pendency of the appeal herein, so that she may be produced in execution of whatever judgment may be finally entered herein.

Dated this 4th day of August, 1932.

STEPHEN M. WHITE,
Attorney for Appellant. [37]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the appellant, Ngai Kwan Ying, through her attorney, Stephen M. White, Esq., and sets forth the errors she claims the above-entitled Court committed in denying her petition for a writ of habeas corpus, as follows:

I.

That the Court erred in not granting the writ of habeas corpus and discharging the appellant, Ngai Kwan Ying, from the custody and control of John D. Nagle, Commissioner of Immigration at the Port of San Francisco.

II.

That the Court erred in not holding that it had jurisdiction to issue the writ of habeas corpus as prayed for in the petition on file herein.

III.

That the Court erred in not holding that the allegations set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus. [38]

IV.

That the Court erred in not holding that the Board of Special Inquiry and/or the Secretary of Labor acted arbitrarily and unfairly in discrediting the witnesses for the appellant.

V.

That the Court erred in not holding that the Board of Special Inquiry and/or the Secretary of Labor acted arbitrarily and unfairly in finding that the alleged discrediting of the appellant's witnesses justified the discrediting of the testimony of the appellant, herself, that she was the wife of her alleged husband.

VI.

That the Court erred in not holding that the Board of Special Inquiry and/or the Secretary of Labor acted arbitrarily and unfairly in finding that the testimony of the appellant, herself, was insufficient to establish that she was the wife of her alleged husband.

VII.

That the Court erred in not holding that the Board of Special Inquiry and/or the Secretary of Labor acted arbitrarily and unfairly in finding that the evidence adduced before the Board of Special Inquiry did not reasonably establish that the appellant was the wife of her alleged husband.

VIII.

That the Court erred in not holding that there was no substantial evidence adduced before the Board of Special Inquiry to justify the conclusion of the Board of Special Inquiry and/or the Secretary of Labor that the appellant was not the wife of her alleged husband.

IX.

That the Court erred in not holding that the appellant was not accorded a full and fair hearing before the immigration authorities. [39]

WHEREFORE, appellant prays that the said order and judgment of the United States District Court for the Northern District of California made, given and entered herein in the office of the Clerk of said Court on the 30th day of July, 1932, denying the petition for a writ of habeas corpus, be reversed and that she be restored to her liberty and go hence without day.

Dated at San Francisco, California, August 4, 1932.

STEPHEN M. WHITE,
Attorney for Appellant.

[Endorsed]: Filed Aug. 5, 1932. Walter B. Maling, Clerk. [40]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appearing to the above-entitled Court that Kwan Tow, the petitioner herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and order of this Court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor,

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled Court make and prepare a transcript of all the papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER ORDERED that the execution of the warrant of deportation of said Ngai Kwan Ying, be and the same is hereby stayed pending this appeal and that the said Ngai Kwan Ying, be not removed from the jurisdiction of this Court pending this appeal.

Dated at San Francisco, California, August 4, 1932.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Aug. 5, 1932. Walter B. Maling, Clerk. [41]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

Good cause appearing therefor, IT IS HEREBY ORDERED that the Immigration Records filed as Exhibits herein, may be transmitted by the Clerk

of the above-entitled Court to and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to be taken as a part of the record on appeal in the above-entitled cause with the same force and effect as if embodied in the transcript of record and so certified by the Clerk of this Court.

Dated this 4th day of August, 1932.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Aug. 5, 1932. Walter B. Maling, Clerk. [42]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of said Court:

Sir:

Please issue for transcript on appeal the following papers, to wit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Findings and decision of Board of Special Inquiry—Petitioner's Exhibit "A".
4. Findings and decision of Secretary of Labor, through Board of Review—Petitioner's Exhibit "B".
5. Appearance of respondent and notice of filing excerpts of testimony, etc.

6. Respondent's memorandum of excerpts of testimony, etc.

7. Minute order re introduction of original immigration records.

8. Minute order denying petition for writ of habeas corpus.

9. Notice of appeal.

10. Petition for appeal.

11. Assignment of errors.

12. Order allowing appeal.

13. Order transmitting original immigration records.

14. Citation.

15. Praecipe.

STEPHEN M. WHITE,
Attorney for Appellant.

[Endorsed]: Filed Aug. 6, 1932. Walter B. Maling, Clerk. [43]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 43 pages, numbered from 1 to 43, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Ngai Kwan Ying,

on habeas corpus, No. 20873-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Eighteen Dollars and Eighteen Cents ($18.80) and that the said amount has been paid to me by the attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said district Court, this 19th day of August, A. D. 1932.

[Seal] WALTER B. MALING, Clerk,
By C. M. TAYLOR,
Deputy Clerk. [44]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America.—ss.

The President of the United States, to John D. Nagle, Commissioner of Immigration, Port of San Francisco, and George J. Hatfield, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the

United States District Court for the Northern District of California, wherein Ngai Kwan Ying, is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harold Louderback, United States District Judge for the Southern Division of the Northern District of California, this 4th day of August, 1932.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed August 6, 1932. Walter B. Maling, Clerk. [45]

[Endorsed]: No. 6941. United States Circuit Court of Appeals for the Ninth Circuit. Ngai Kwan Ying, Appellant, vs. John D. Nagle, Commissioner of Immigration, Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed Aug. 19, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NGAI KWAN YING,
Appellant,

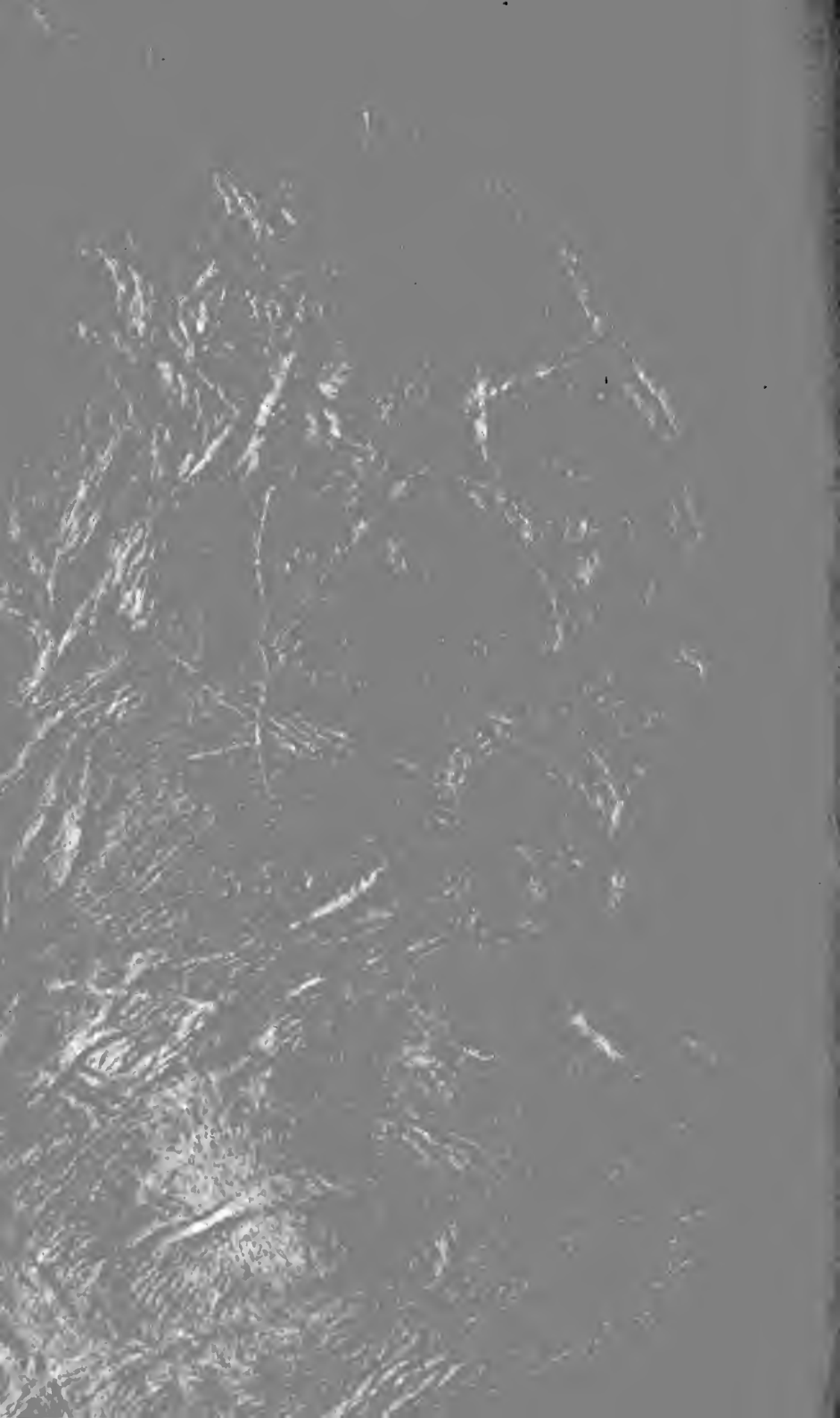
vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

STEPHEN M. WHITE,
576 Sacramento, Street,
San Francisco, California,
Attorney for Appellant.

Parker Printing Company, 545 Sansome Street, San Francisco.



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No. 6941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NGAI KWAN YING,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The appellant is a Chinese female, who was born in China and who, upon her arrival in the Port of San Francisco on December 29, 1931, applied to the immigration authorities for admission to the United States under the status of a wife of a merchant. (*U. S. v. Mrs. Gue Lim,* 176 U. S. 459, 44 L. Ed. 544; *Cheung Sum Shee v. Nagle,* 268 U. S. 336, 69 L. Ed. 985.) A Board of Special Inquiry, which was convened at the port, decided that the appellant was not

the wife of her alleged merchant husband, Kwan Tow, but conceded that the latter was a merchant. (Tr. of R., pp. 16-26.) An appeal was taken to the Secretary of Labor with the result that the decision of the Board of Special Inquiry was affirmed. (Tr. of R., pp. 27-30.) Having been held in custody for deportation by the Commissioner of Immigration for the Port of San Francisco, a petition for a writ of habeas corpus was presented in behalf of the appellant in the Court below. (Tr. of R., pp. 1-15.) There were filed with the petition, as exhibits copies of the decisions of the Board of Special Inquiry and the Secretary of Labor. (Tr. of R., pp. 16-26 and pp. 27-30.) In opposition to the petition, counsel for the appellee, the respondent in the Court below, filed a memorandum of excerpts taken from the original immigration record. (Tr. of R., pp. 31-58.) From the denial of the petition, this appeal comes.

ISSUE IN THE CASE.

Kwan Tow, the alleged husband of the appellant, was first admitted to the United States in 1921, under the status of a minor son of a merchant. He, thereafter, made one trip to China, departing in January, 1931, and returning in December, 1931, in company with the appellant. (Tr. of R., p. 31.) He is said to have married the appellant at Ping Kai village, Far Yuen District, China, on April 6, 1931. The petition for a writ of habeas corpus contains a narrative of

his testimony and that of the appellant. (Tr. of R., pp. 4-10.)

The other witness for the appellant was a lady by the name of Au Yeung Shee, married and the mother of several children, who claims no relationship to either the appellant or the alleged husband. She was first admitted to the United States in 1920 and she was, thereafter, in China from December, 1930, to November, 1931. (Tr. of R., p. 31.) She claims to have attended the wedding of the appellant and her alleged husband. Her testimony was, also, narrated in the petition for a writ of habeas corpus. (Tr. of R., p. 10.)

In addition to the testimony of the appellant, her alleged husband, Kwan Tow, and the unrelated witness, Au Yeung Shee, there were introduced in evidence several documents, which consisted of the following:

1. A photograph, which was taken in China, showing the alleged husband and the appellant standing together, the latter in bridal costume. (This photograph has been mentioned by the Secretary of Labor in his decision.)

2. A marriage certificate, in the Chinese language, certifying to the marriage between the appellant and her alleged husband. (This certificate has been mentioned both in the petition for a writ of habeas corpus, Tr. of R., p. 11, and in the decision of the Secretary of Labor, the latter terming the document "a three-generation paper".)

3. A consular visa issued by the American Consul at Hongkong, China, to which there is attached the American Consul's report, as follows:

> "The applicant is proceeding to the United States as the wife of a lawfully domiciled treaty merchant, Kwan Tow (Too), who is the holder of a merchant's Return Permit No. 675-989, dated January 22, 1931, and who is connected with the Golden State Meat Market at 916 H Street, Modesto, California. The couple was married according to Chinese custom on April 6, 1931, and various witnesses have testified satisfactorily to this office as to the legality of the marriage." (This report has not been mentioned by the Secretary of Labor in his decision, although it is contained in the immigration files, which were before him, and which were in evidence at the hearing before the Board of Special Inquiry, original immigration record No. 807/428, second from last page.)

The issue raised by the petition for a writ of habeas corpus is whether or not the rejection of the appellant's testimony and evidence adduced before the Board of Special Inquiry and presented to the Secretary of Labor in support of her claim to be the wife of her alleged husband has been so arbitrary and unreasonable as to constitute a denial of a fair hearing.

Quock Hoy Ming et al. v. Nagle, 54 Fed. (2d) 875, at page 876, C. C. A. 9th.

Adverting to the grounds for the rejection of the appellant's testimony and evidence and, hence, for the

denial of the existence of the claimed relationship, we find that the Secretary of Labor made the following findings and decision:

> "This case comes on appeal from denial of admission as the wife of a Chinese merchant. The relationship is at issue.
>
> Board: Winings, Tetlow, McNeal, Ebey and Ward.
>
> Attorney Roger O'Donnell has been heard and filed a brief.
>
> The alleged husband who went to China in January, 1931, returned on the same ship with the applicant and an alleged acquaintance, who claims to have attended the applicant's wedding, have testified. The record shows such adverse features as the following:
>
> There are discrepancies in the testimony as to whether the applicant and her alleged husband went together or separately to visit her parents and between the applicant and both of her witnesses as to whether the identifying witness had her three children with her when they met in Hongkong. There is also inconsistency between the description of the alleged husband's home village as given in the present testimony and that which has heretofore been given by the alleged brothers of the alleged husband.
>
> However, the outstanding adverse feature in the case is the fact that the alleged husband's record shows him to be deserving of no credence as a witness and the record of the identifying witness indicates that she has small regard for the truth.

In 1923, the alleged husband and his alleged father appeared to testify on behalf of a woman and girl claimed by this alleged husband to be his mother and sister. This woman when confronted with her own previous record confessed that she was not the wife of this alleged husband's father nor the mother of the girl who accompanied her and admitted that she was identical with a woman who had previously been deported from the United States as a prostitute. This alleged husband unquestionably gave false testimony in connection with that application in 1923 and in the present case has repeated the false testimony with regard to his mother and sister.

The identifying witness in connection with her own application for admission as a returning laborer at San Francisco in November, 1931, appears to have made false statements regarding the disposal of the property upon which her laborer's return certificate had been issued.

A photograph of this applicant and her alleged husband taken in China and the so-called three generation papers frequently presented in those cases and have been placed in evidence. The photograph obviously does not prove that the persons pictured in it are husband and wife and it is to be noted that in the fraudulent case of the alleged husband's alleged mother's attempt to enter in 1923 similar three generation papers were presented.

In view particularly of the discrediting records of both of the applicant's witnesses, it is not believed that the evidence satisfactorily or reason-

ably establishes that she is the wife of her alleged husband.

It is, therefore, recommended that the appeal be dismissed.

W. W. Smelser,
Assistant to the Secretary."

(Tr. of R., pp. 27-30.)

ARGUMENT.

A FINDING OR DECISION BY ADMINISTRATIVE OFFICERS, IF NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS ARBITRARY AND BASELESS AND RENDERS THE HEARING UNFAIR; WHETHER OR NOT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE DECISION IS A QUESTION OF LAW REVIEWABLE BY THE COURT.

In support of the foregoing proposition, we believe that it will be sufficient to quote from the decision of the Supreme Court in *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431, at page 433, the following:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by

administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (Cases cited), or if the facts found do not, as a matter of law, support the order made (Cases cited).

* * *. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power."

See, also:

Kwock Jan Fat v. White, 253 U. S. 455, 64 L. Ed. 1010, at page 1012;

Go Lun v. Nagle, 22 Fed. (2d) 246, C. C. A. 9th;

Gung Yow v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th;

Hom Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th;

Young Len Gee v. Nagle, 53 Fed. (2d) 448, C. C. A. 9th.

IT WAS ARBITRARY AND UNFAIR TO THE APPELLANT TO USE TESTIMONY OF PERSONS GIVEN IN A PRIOR PROCEEDING, INVOLVING DIFFERENT PARTIES AND DIFFERENT ISSUES, AND, UPON THIS TESTIMONY, TO DISCREDIT HER ALLEGED HUSBAND.

It is urged by the Secretary of Labor that the appellant's alleged husband, Kwan Tow, testified falsely in 1923 in proceedings before the immigration authorities involving the applications for admission of a lady by the name of Wong Shee and a girl by the name of Quon Yit Gew and that, by reason of this false testimony, he is discredited as a witness for the appellant. It appears that in 1923 Wong Shee applied for admission as the wife of one Kwan Chong, who is the appellant's alleged husband's father, and that Quon Yit Gew applied for admission as the daughter of Kwan Chong. The appellant's alleged husband testified in the proceedings in 1923 that Wong Shee was his mother and that Quon Yit Gew was his sister. (Tr. of R., pp. 32-35.) Quon Yit Gew testified in 1923 that Kwan Chong, also known as Kwan Sung Jew, was her father, but, when confronted with this man, she identified him as her second brother, Kwan Tow (Too), and, when confronted with Kwan Tow, she was unable to identify him as any person whom she knew. (Tr. of R., pp. 38-39.) Wong Shee testified in 1923 that she was identical with a woman, who had been admitted in 1913 as the wife of one Yee Chung Sing and who was deported in 1918, that she was really not the wife of Kwan Chong and that Quon Yit Gew, who was then, also, applying for admission, was not her daughter. (Tr. of R., pp. 41-42.) Wong Shee and Quon Yit

Gew were deported, evidently upon the ground that they were not the wife and daughter, respectively, of the appellant's alleged husband's father, Kwan Chong. In the case of the appellant, the alleged husband repeated his testimony given in 1923 to the effect that Wong Shee was his mother and that Quon Yit Gew was his sister, adding that Wong Shee died in China on February 12, 1931, and that Quon Yit Gew was now living in the Straits Settlements. (Tr. of R., p. 35.) The statement of the examining inspector (Tr. of R., p. 38) that the appellant's alleged husband was in 1923 "furthering an attempt to import Chinese women to this country for immoral purposes" is entirely unsupported by any evidence.

It is, we concede, settled that the Courts will not pass upon the credibility of witnesses produced before the administrative officers, but will leave this question with the latter. However, the legal effect of evidence is a question of law and the Court will determine whether or not the administrative officers in discrediting the witnesses have acted fairly and reasonably.

In *Interstate Commerce Commission v. Louisville & N. R. Co.,* supra, the Supreme Court said:

> "* * * In a case like the present the courts will not review the Commission's conclusion of fact (Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 251, 55 L. Ed. 456, 31 Sup. Ct. Rep. 392) by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the

power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.' 36 Stat. at L. 551, chap. 309.

* * * The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. Ed. 860, 24 Sup. Ct. Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its right or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding."

As the alleged husband testified in the appellant's case, in respect to Wong Shee and Quon Yit Gew, exactly, as he had testified in 1923 (Tr. of R., pp. 34-38), he could not be discredited upon the theory that

his own testimony was contradictory. His demeanor and manner, while testifying for the appellant, have not been assailed, he has never been convicted of any crime and his general reputation for truth and honesty has not been questioned. Therefore, it remains to be considered whether or not it is fair and just to the appellant to discredit her alleged husband upon the contradictory statements of Wong Shee and Quon Yit Gew made in 1923 in prior proceedings, involving different parties and different issues, it being necessarily conceded that the appellant was a total stranger to the prior proceedings and that the issue in those proceedings involved the question of whether or not Wong Shee and Quon Yit Gew were the mother and sister, respectively, of the appellant's alleged husband, whereas the issue in the case of the appellant was whether or not she was the wife of the alleged husband.

In *Fresh v. Gilson,* 10 L. Ed., 982, at page 984, the Supreme Court said:

> " * * * The principles, that the best evidence the nature of the case admits of must always be produced, and that a person shall not be affected by that which is *res inter alios acta,* are too familiar to require authorities to support them. We will mention, however, as applicable to these points, 3 Bac. Abr. 322. 1; 3 East 192; 2 Wash. 287; 5 Cranch 14; 1 Starkie's Ev. 58, 59. But familiar as these principles may be as rudiments of the law, *they are elements which enter essentially into the security of life, character, and property.* * * * "

In *Greenleaf on Evidence,* 16th Edition, Volume 1, Sec. 523, it is said:

> "It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound."

In *Wigmore on Evidence,* 2nd Edition, Volume III, Sec. 1386, p. 63, it is said:

> "* * * Unless the issues were then the same as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods. Unless, furthermore, the parties were the same in motive and interest, there is a similar inadequacy of opportunity, for the present opponent cannot be fairly required to abide by the possible omissions, negligence, or collusion of a different party, whose proper utilization of the opportunity he has no means of ascertaining."

And in the footnote to the foregoing, we find the following:

> "1767, Buller, J., Trials at Nisi Prius, 239: A deposition cannot be given in Evidence against any person that was not a party to the suit; and the reason is because he had not liberty to cross-examine the witness, and it is against natural justice that a man should be concluded by proof in a cause to which he was not a party."
>
> "In 1862, Hinman, C. J., in Law v. Brainerd, 30 Conn. 579: As that was a trial between differ-

> ent parties, having different rights and with whom the plaintiff had no privity, and as he has no opportunity to examine or cross-examine the witnesses, it would be contrary to the first principles of justice to bind or in any way affect his interests by the evidence given on that occasion."

In *Lee Choy v. U. S.,* 49 Fed. (2d) 24, C. C. A. 9th, this Court decided in favor of the proposition for which we contend, when it held that testimony of witnesses taken in a proceeding, to which the appellant was not a party, was inadmissible against him. At page 27, the Court said:

> "* * * In this case, the testimony of many of the witnesses referred to was taken in a nonjudicial proceeding to which appellant was not a party, and hence was inadmissible against him."

We, therefore, submit that it was entirely improper and unfair to the appellant to use in her case the testimony given in 1923 by Wong Shee and Quon Yit Gew, not only because it is a "rudiment of the law", but, also, because it is an "obvious principle of justice" that no person's rights shall be affected by evidence given in a prior proceeding, which involved different issues and different parties, "for the present party cannot be fairly required to abide by the possible omissions, negligence, or collusion of a different party".

Fresh v. Gilson, supra;
Greenleaf on Evidence, supra;
Wigmore on Evidence, supra.

Without the testimony given in 1923 by Wong Shee and Quon Yit Gew, there, of course, remains no basis for discrediting the appellant's alleged husband.

While it is appreciated that administrative officers are not bound by the strict rule of evidence applicable in suits at law, nevertheless, it must be conceded that these officers may not disregard fundamental rules based upon obvious principles of justice and reason.

Interstate Commerce Commission v. Louisville & N. R. Co., supra;

Kwock Jan Fat v. White, supra.

In the case of *Yee Doo Yen v. Tillinghast,* No. 4486-Civil, D. C. of Mass., unreported, the Court said:

> "Our legal rules of evidence, where they concern hearsay, rest, I believe, on accumulated experience. Judges and lawyers over many generations have found that statements such as were relied on here are unsafe to adopt. They appear to be an easy road to the truth; but really they are not safe to follow. It is settled that immigration tribunals are not bound by legal rules of evidence; but to reject the consistent, direct, detailed and unshaken testimony of three witnesses who appear and are cross-examined, on hearsay statements made by other persons in an independent proceeding where the issue involved in the present proceeding was not raised, seems to me to be arbitrary and unjustified."

U. S. ex rel. Ng Kee Wong v. Day, 44 Fed. (2d) 406, at page 407;

Flynn ex rel. Chin She Yin v. Tillinghast, 56 Fed. (2d) 317, C. C. A. 1st.

In practically all of the cases, in which the Courts have sanctioned the use of prior immigration records to discredit the applicant's principal witness, it will be found that the issue involved was whether or not the applicant was the son of an alleged father, who was usually conceded to be an American citizen.

Johnson v. Kock Shing, 3 Fed. (2d) 889, C. C. A. 1st;

Moy Said Ching v. Tillinghast, 21 Fed. (2d) 810, C. C. A. 1st;

Quan Wing Seung v. Nagle, 41 Fed. (2d) 58, C. C. A. 9th;

U. S. ex rel. Fong Lung Sing v. Day, 37 Fed. (2d) 36, C. C. A. 2nd;

Wong Foo Gwong v. Carr, 50 Fed. (2d) 360, C. C. A. 9th.

In such cases, the question of whether or not an applicant is the son of an alleged father largely depends upon the foundation which has been laid through the statements of the alleged father or of an alleged member of the family to the immigration authorities at various times throughout a long period of time as to the membership of the family. Manifestly, as long as an applicant, who seeks admission as the son of an alleged father, depends for his affirmative showing, as he does in every case, upon these prior recorded statements to establish his membership in a certain family, he has no ground for complaint if he or his alleged father or an alleged member of his family testifies in contradiction to the recorded statements and

if, by reason of the contradictory statements, it turns out that he is not a member of his alleged family. If for no other reason, these prior records would be admissible, in cases involving relationship between an applicant and his alleged father, upon the ground that the statements contained therein respect pedigree reputation and emanate from persons, who are not strangers to the applicant, but, who are identified by the applicant to be members of his alleged family.

In *Patterson v. Gaines et ux.,* 6 How. 550, 12 L. Ed. 553, at p. 573, the Supreme Court said:

> "* * * The complainants do not rely upon such proof to establish the fact that De Grange was a married man when he married Zuline. His declaration to Madame Benguerel associated with other facts sufficiently proves it.
>
> Before leaving this point, however, we will make a single remark upon what was said in the argument, that, if the record of De Grange's conviction had been produced, it would not have been competent testimony, from its being *res inter alios acta.*
>
> The general rule certainly is, that a person cannot be affected, much less concluded, by any evidence, decree, or judgment, to which he was not actually or in consideration of law, privy. But the general rule has been departed from so far as that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also; such as in cases of manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigrees. * * *."

Hence, where the issue in a case involves the relationship of an applicant to his alleged father, it is not arbitrary or unfair for the immigration authorities to give effect to the prior records containing evidence as to the membership of the family and as to related matters to ascertain the pedigree reputation of the family and, thus, to determine whether or not the applicant is a member of the family. Such a case comes within the exception to the general rule that a person cannot be affected by evidence given in a prior proceeding to which he was not a party.

However, there is a great difference in a case, such as we have here, where the appellant's right to admission does not in any manner depend upon prior declarations as to family pedigree and history and where the prior declarations, which have been used to prejudice her right to admission, were made in an entirely unconnected proceeding by persons, who were total strangers to the appellant. The appellant was not married to her alleged husband until April 6, 1931, and in 1923, when the prior testimony, which is relied upon by the appellee, was given, she was not even acquainted with her alleged husband or with Wong Shee and Quon Yit Gew, the persons whom the alleged husband claimed as his mother and sister, respectively, or with any other person, who was a party to the proceeding in 1923. Furthermore, the appellant does not claim to have ever known her alleged husband's mother or sister, the evidence being that his mother, Wong Shee, died in February, 1931 (Tr. of R., p. 35), or about

two months prior to the marriage between the appellant and her alleged husband, and that his sister, Quon Yit Gew, has been living in the Straits Settlements since shortly after November 14, 1926. (Tr. of R., p. 35.)

In *U. S. ex rel. Ng Kee Wong v. Day,* 44 Fed. (2d) 406, supra, the Court, in distinguishing the cases of *Johnson v. Kock Shing,* supra, and *Moy Said Ching v. Tillinghast,* supra, at page 407, said:

> "* * * In any event, in those two cases the prior contradictory testimony had been given by the very person later claiming to be the father; a prior disclaimer of parenthood certainly stands on a different footing from the prior testimony of an ex-neighbor, long a resident of the United States, in the course of a proceeding to which the alleged father and son were not parties. * * *"

We anticipate that counsel for the appellee will rely chiefly upon the cases of *Quan Wing Seung v. Nagle,* supra, and *U. S. ex rel. Fong Lung Sing v. Day,* supra, but we submit that these cases are not in point.

In *Quan Wing Seung v. Nagle,* supra, the facts disclosed that the alleged father had testified in 1911 that he had no children; in 1925, he attempted to secure the admission of an alleged son, whom he claimed was born in 1906. The Court held that the alleged father's false testimony given in 1925, as to the birth of a son in 1906, justified the immigration authorities in discrediting him as a witness for the appellant, who applied for admission as his son in 1930. Obviously, the alleged father was discredited by his own contradictory statements as to the membership of his family

and, furthermore, the issue in the case of the alleged son, who applied for admission in 1925, was substantially the same as the issue in the case of the alleged son, who applied for admission in 1930, in that each case involved the question of the membership of the alleged father's family.

In the case at bar, the alleged husband has not been discredited by his own contradictory statements, as, indeed, he could not be, in that his testimony in the appellant's case, in respect to Wong Shee and Quon Yit Gew, is precisely, the same as his testimony given in 1923. (Tr. of R., pp. 32-38.) The alleged discrediting of his testimony arises from the testimony of third persons given in a prior proceeding. Furthermore, the issue in the cases of *Wong Shee* and *Quon Yit Gew* was entirely different than the issue in the case of the appellant. When Wong Shee and Quon Yit Gew applied for admission in 1923, the immigration authorities were called upon to decide whether or not they were the wife and daughter, respectively, of the appellant's alleged husband's father, Kwan Chong; in the case of the appellant, the immigration authorities were called upon to decide whether or not the appellant married her alleged husband in China on April 6, 1931.

In *U. S. ex rel. Fong Lung Sing v. Day,* supra, the distinctions, as pointed out in *Quan Wing Seung v. Nagle,* supra, are applicable, in that in that case the alleged father was also discredited by his own contradictory statements made in prior proceedings involving substantially the same issue, namely, the number of sons that he had.

In *Gung You v. Nagle,* 34 Fed. (2d) 848, at page 852, this Court said:

> "* * * The method of ascertaining the credibility of a witness has been known to the law for centuries, and our juries, when called upon to pass upon testimony, are fully instructed thereon. Aside from the appearance of the witness, his demeanor on the stand, and the reasonableness of his testimony, and his character, as determined by his manner of testifying or by evidence of a good or bad reputation, he can only be impeached by evidence of contradictory statements made out of court or in court on *material* matters. This is the law's method of measuring the credibility of witnesses."

In *Crocker First Federal Trust Co. v. U. S.,* 38 Fed. (2d) 545, C. C. A. 9th, at page 547, the Court said:

> "* * * Moreover the offer was to impeach the witness and a witness cannot be impeached upon an immaterial or collateral matter, particularly when it is first brought on cross-examination. 40 Cyc. 2769. * * There was no claim here of that broad right of cross-examination but the narrower right of impeachment. In the exercise of that discretion, the trial court could and should consider the rule that evidence tending to degrade a witness unnecessarily should be excluded. * * *"

Also, in *Cvitkovic et al. v. U. S.,* 41 Fed. (2d) 682, C. C. A. 9th, at page 684, the Court said:

> "To bring a case within the maxim, *falsus in uno, falsus in omnibus,* there must be conscious falsehood, and the falsehood must be upon a material point. Wigmore on Evidence (2nd Ed.) Sections 1013, 1014. * * *"

Obviously, the question of whether or not the appellant is the wife of her alleged husband through a marriage occurring in China on April 6, 1931, has not even a remote bearing upon the question of whether or not Wong Shee and Quon Yit Gew, the persons, who applied for admission in 1923, are the mother and sister, respectively, of the appellant's alleged husband.

In the following cases, it has been held that inconsistent testimony contained in prior immigration records, as to immaterial and collateral issues, does not "discredit the texture of the rest of the testimony" as to the material issue in the case.

Louie Poy Hok v. Nagle, 48 Fed. (2d) 753, C. C. A. 9th;

Flynn ex rel. Chin She Yin v. Tillinghast, 56 Fed. (2d) 317, C. C. A. 1st, supra;

Jew Yut Chew v. Tillinghast, 25 Fed. (2d) 886, D. C.;

Moy Fong v. Tillinghast, 33 Fed. (2d) 125 D. C.;

Yee Doo Yen v. Tillinghast, supra;

U. S. ex rel. Ng Kee Wong v. Day, supra.

IN DISCREDITING THE APPELLANT'S ALLEGED HUSBAND, UPON THE BASIS OF HIS ALLEGED FALSE TESTIMONY GIVEN IN 1923, THE IMMIGRATION AUTHORITIES HAVE ACTED INCONSISTENTLY, UNREASONABLY AND UNFAIRLY.

The appellant's right to admission depended upon the ascertainment by the immigration authorities of two material facts, namely, (1) that her alleged hus-

band was a domiciled merchant and (2) that she was the wife of her alleged husband. As to the first subject of inquiry, it is important to observe that the Board of Special Inquiry expressly conceded that the alleged husband was a domiciled merchant, the finding being as follows:

> "By Chairman:
>
> The applicant Ngai Kwan Ying, seeks admission as the lawful wife of Kwan Tow, an alleged domiciled merchant of Modesto, California, whose status as such was conceded by this service when Form 632 was granted him January 22, 1931. Although, in my opinion, there is evidence strongly indicative that the original admission of this Chinese was secured through fraud, I believe, in view of the department's action in May, 1931, in sustaining the appeal of an alleged brother, Kwan Moon, in whose case the same feature was at issue, that the board should concede the exempt status of the alleged husband in the present matter. * * *"

However, the alleged husband could not be a domiciled merchant, unless his original admission in 1921, as the minor son of his alleged merchant father, Kwan Chong, was lawful.

> *Wong Mon Lun v. Nagle,* 39 Fed. (2d) 844, C. C. A. 9th.

Hence, the concession that the alleged husband was a domiciled merchant necessarily embodied the concession that he was, in fact, the son of Kwan Chong, the person under whose status he was originally admitted.

We, therefore, have the situation where the immigration authorities, in the case of the appellant, have effectively credited the alleged husband's claim to be the son of his alleged father, Kwan Chong, upon which claim the legality of his domicile and his right to be a merchant necessarily depend, yet, they have discredited him when he claims to be the husband of the appellant, although in each instance they had before them and fully considered the testimony given in 1923 by the alleged husband and the then applicants, Wong Shee and Quon Yit Gew, whom he allegedly falsely claimed to be his mother and sister, respectively. Such action is manifestly inconsistent and, we submit, unreasonable and unfair, especially inasmuch as the alleged false testimony given in 1923 was infinitely more material and relevant to the question of the alleged husband's relationship and identity as the son of his alleged father than it was to the question of whether or not he was the husband of the appellant. In other words, it appears unreasonable and unfair for the immigration authorities to hold that the alleged false testimony given in 1923 rendered the alleged husband unworthy of belief, insofar as the appellant's rights were concerned and, at the same time, to hold that he is worthy of belief insofar as his own rights were involved.

In the case of *Wong Dock v. Nagle,* 41 Fed. (2d) 476, it was held that the immigration authorities, after considering and conceding the marital status of the alleged father in the case of a son, who applied for admission in 1909 and in the case of another son, who

applied for admission in 1924, that it was unreasonable and unfair to deny that the marital status of the alleged father in the case of his third son who applied for admission in 1930, when the evidence was identical in all three cases. At page 477, the Court, through His Honor Judge Wilbur, said:

> "It must be conceded that it would be unreasonable and unfair for the immigration authorities, after fully investigating the discrepancy between the statement of the alleged father in 1897, when he stated that he was unmarried and his later statement made in 1909 in an effort to secure the entry of his son Wong Woon, and having determined that Wong Woon was the legitimate son of the marriage of the father and Hom Shee, and after having reached a similar conclusion in 1924 on the admission of Wong Cheng, an alleged brother, to turn about and on the same evidence and without any additional circumstances to hold that no such marriage occurred, and for that reason deny admission to the alleged second son, * * *."

THE ALLEGED DISCREDITING OF THE APPELLANT'S UNRELATED WITNESS, AU YEUNG SHEE, WAS ARBITRARY AND UNFAIR.

The unrelated witness, Au Yeung Shee, claims to have attended the ceremony incident to the marriage between the appellant and her alleged husband. (Tr. of R., p. 10.) However, it appears that in November, 1931, this lady returned to the United States from

a trip to China and that, as evidence of her right to admission, she presented a so-called laborer's return certificate. This certificate had been issued to Au Yeung Shee, prior to her departure for China in December, 1930, upon a showing that she had property in the United States to the amount of $1,000, 8 U. S. C. A., Sec. 276, the same consisting of cash in bank, and the immigration authorities took the position that she could not return to the United States, unless the money had remained intact in bank during her sojourn abroad. In line with this position, an investigation was conducted and, as a result, it was found that she had borrowed $800.00 from the bank, using her deposit of $1,000.00 as security. When questioned, Au Yeung Shee stated that she had not borrowed any money from the bank. (Tr. of R., pp. 43-46.) For the reason that it is said that Au Yeung Shee gave false testimony as to her bank account, in a proceeding involving her own application for admission and in which the appellant was in nowise concerned, it is concluded that she is not to be believed when she testifies, as a witness for the appellant, that she attended the wedding of the appellant and her alleged husband in China in April, 1931.

We submit that the matter of Au Yeung Shee's transactions with the bank is entirely too remote to the issue involved in the case at bar to justify the discrediting of her testimony in behalf of the appellant. Obviously, there is no conceivable connection between the fact of her attendance at the marriage of the appellant and the fact that she borrowed money from

the bank. To discredit this witness upon such a wholly immaterial matter is arbitrary and unfair under the authority of all of the decided cases.

Crocker First Federal Trust Co. v. U. S., supra;
Cvitkovic et al. v. U. S., supra;
Louie Poy Hok v. Nagle, supra;
Flynn ex rel. Chin She Yin v. Tillinghast, supra;
Jew Yut Chew v. Tillinghast, supra;
Moy Fong v. Tillinghast, supra;
Gung Yow v. Nagle, supra.

Moreover, a reading of the testimony of Au Yeung Shee, which was given at the time of her application for admission, in respect to her bank account, leaves considerable doubt as to whether or not she did consciously testify falsely (Tr. of R., pp. 43-46), it appearing that her alleged husband, Leong Poy, actually handled the transaction at the bank and that she knew little or nothing concerning it. However, the fact remains that Au Yeung Shee was finally admitted to the United States as the result of an appeal taken to the Secretary of Labor from the excluding decision of the Board of Special Inquiry. (Immigration record No. 31038/2-1.) Thus, it was effectively conceded that either Au Yeung Shee did not give false testimony or that the question of whether or not she had borrowed money from the bank was immaterial to her right to admission. Manifestly, if the matter were immaterial to her own application for admission, it

must be even less material to the application for admission of the appellant.

THE IMMIGRATION AUTHORITIES HAVE ARBITRARILY AND UNFAIRLY REJECTED THE AFFIRMATIVE EVIDENCE ESTABLISHING THAT THE APPELLANT WAS THE WIFE OF HER ALLEGED HUSBAND.

As between the appellant and her alleged husband, the Secretary of Labor, in his decision, supra, concedes that there is only one discrepancy and this has reference to whether the appellant and her alleged husband went together or separately to visit her parents, who resided at a village about 3 miles distant from the alleged husband's village. The appellant's testimony is that she and her husband walked the distance, both ways, together, whereas the alleged husband testified that both in going and returning he was preceded by his wife, both the appellant and the alleged husband, however, agreeing that the trip was made on November 14, 1931, and the appellant adding that the occasion was the betrothal of her brother. (Tr. of R., pp. 52-53.) Inasmuch as the exact distance, which may have separated the two and the time that may have elapsed between the time of the arrival of the appellant and the alleged husband were not made the subjects of inquiry, it cannot be said that any substantial discrepancy exists.

In *Wong Hai Sing v. Nagle,* 47 Fed. (2d) 1021, C. C. A. 9th, at page 1022, the Court said:

> "The courts have held that in long and involved cross-examination of several persons covering the

minutiae of daily life, discrepancies are bound to develop and are inconclusive with regard to the testimony as a whole when they are on minor points. There are many discrepancies of that nature in the case here presented, details which of themselves would not be sufficient to justify the exclusion order of the Board: the exact hour and length of time of the first visit of Wong Hai Sing to the home of his alleged wife; whether or not the bride's house was rented or had been in her family for several generations; whether the mother of Wong Ho Shee had bound or unbound feet; whether the mother or the daughter was taller; and the exact time when the appellant made presents of jewelry to Wong Ho Shee. These are details upon which people might err very easily, and do not per se prove a deliberate attempt at falsification."

We, therefore, have the uncontradicted testimony of the appellant and her alleged husband as to the fact of marriage, the events contemporaneous therewith, their subsequent cohabitation as man and wife in the alleged husband's home at Ping Kai village, visits to Canton City, the journey from the home village to the United States, relatives on both sides of the family and as to all of the other countless matters concerning which they were questioned. (Tr. of R., pp. 4-10.) Such testimonial agreement could not reasonably be expected to appear unless the claim of relationship was genuine.

Hom Chung v. Nagle, 41 Fed. (2d) 126, C. C. A. 9th;

Young Len Gee v. Nagle, 53 Fed. (2d) 448, C. C. A. 9th.

Although the immigration authorities have held, erroneously, as we have endeavored to point out, that the alleged husband, as well as the unrelated witness, Au Yeung Shee, are discredited, nevertheless, there remains the direct and positive testimony, reasonable and probable, uncontradicted by any fact or circumstance, of the appellant, herself. Moreover, the Secretary of Labor does not assign any reason for the rejection of the appellant's testimony, but we assume that it may be contended that it is not entitled to full credit for the reason that the appellant is an interested party.

In *U. S. ex rel. Basile v. Curran,* 298 Fed. 951, D. C., Judge Hand said:

> "* * * It is not enough for the Board of Special Inquiry to say that they do not believe that the certificate was retained by the counsel, in the face of his jurat, or that it was false, when they had not seen it. They have no power to dispense with the usual means of ascertaining the truth. They are as much bound to proceed rationally as I am, and it is not rational procedure to disregard evidence inherently probative for no assignable reasons. * * * "

In *Quock Ting v. U. S.,* 140 U. S. 417, 11 Sup. Ct. 733, 35 L. Ed. 501, at page 502, the Supreme Court said:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by

anyone, should control the decision of the court; * * *."

In *Chin Hing v. U. S.*, 24 Fed. (2d) 523, C. C. A. 5th, at page 524, the Court said:

"We are of opinion that appellant fairly met the burden that was on him to prove that he is a citizen of the United States. There is nothing inherently improbable or unreasonable in the testimony submitted to sustain his claim of citizenship. He was corroborated by two witnesses, who were in position to know the facts, and by the circumstance that he was able to read and speak the English language. The testimony of the two white witnesses is of little weight, especially since the District Judge did not have them before him. Even if their testimony could be held sufficient to discredit Chin Bing, the testimony of appellant and his uncle still remains unimpeached. It is only by arbitrarily rejecting the uncontradicted testimony that the order of deportation can be sustained.

The same fairness and impartiality should govern in considering and weighing the testimony of persons of Chinese descent who claim to be citizens of this country as are given to the testimony of any other class of witnesses. Kwock Jan Fat v. White, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010; Yee Chung v. United States (C. C. A.) 243 F. 126. The case was not capable of any better proof than was made. We are of opinion that it satisfactorily was made to appear that appellant is a citizen of the United States."

In *Woey Ho v. U. S.,* 109 Fed. 888, C. C. A. 9th, it is said:

> "A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed or country, whether rich or poor stand equal before the law. It is the duty of the Courts to exercise their best judgment, not their will, whim or caprice, upon the credibility of every witness. * * *."

Yee Chung v. U. S., 243 Fed. 126, C. C. A. 9th.

> "Suspicion should not control uncontradicted evidence."

Becker v. Miller, 7 Fed. (2d) 293, C. C. A. 2nd; *Sturtevant v. U. S.,* 36 Fed. (2d) 562, C. C. A. 9th.

As to the rule of evidence in respect to the effect to be accorded uncontradicted testimony of an unimpeached witness, although an interested party, we refer to the recent decision of the Supreme Court in *Chesapeake & O. Ry. Co. v. Martin,* 283 U. S. 209, 51 Sup. Ct. 453, wherein it was held that the testimony of a witness, which was reasonable and probable, uncontradicted and candid, could not be rejected merely upon the ground that the witness was the agent of his principal and, therefore, an interested party. We take the liberty to quote at length from the decision, as follows:

"At the conclusion of respondents' case in rebuttal, petitioner demurred to the evidence upon the ground that the action was barred by the provision of the bill of lading requiring claims for loss or damage in case of failure to make delivery to be made 'within six months after a reasonable time for delivery has elapsed.' The demurrer was overruled and judgment entered against petitioner upon verdict for the sum of $1684.39. The trial court said that the testimony of the freight agent was no part of the plaintiffs' case; that the misdelivery was made through his office; that, although unimpeached, the jury would not be bound to accept the evidence of the agent as conclusive; and, consequently, that the court was obliged to disregard it and overrule the demurrer to the evidence. * * *

A demurrer to the evidence must be tested by the same rules that apply in respect of a motion to direct a verdict. (Cases cited) In ruling upon either, the court must resolve all conflicts in the evidence against the defendant; but is bound to sustain the demurrer or grant the motion, as the case may be, whenever the facts established and the conclusions which they reasonably justify are legally insufficient to serve as the foundation for the verdict in favor of the plaintiff. (Cases cited) And in the consideration of the question, the court, as will be shown, is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting

doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable. * * *

We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held.

It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generali-

> zations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most, of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested. We have been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here disclosed. Applied to such facts and circumstances, the rule, by the clear weight of authority, is definitely to the contrary. (Cases cited.)"

The Supreme Court supported its decision by abundant citations and quotations.

The several cases, *Weeding v. Ng Bin Fong,* 24 Fed. (2d) 821, C. C. A. 9th; *Quan Wing Seung v. Nagle,* 41 Fed. (2d) 58, C. C. A. 9th; *Wong Fat Shuen v. Nagle,* 7 Fed. (2d) 611, C. C. A. 9th, wherein the Court has held that the immigration authorities were not bound to believe an applicant, disclose that "there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested".

However, the testimony of the appellant does not stand alone and it does not lack corroboration. Although assuming, *arguendo,* that her alleged husband gave false testimony in 1923, in respect to his mother and sister, and that the unrelated witness, Au Yeung Shee, gave false testimony in November, 1931, when she was

an applicant for admission, in respect to having borrowed money from the bank, nevertheless, as we have endeavored to point out, these matters are entirely immaterial to the question of whether or not the appellant is the wife of her alleged husband and, hence, it would be unfair and unreasonable to discredit their testimony as to this material question.

In *Louie Poy Hok v. Nagle,* 48 Fed. (2d) 753, at page 755, this Court said:

> "It is true that the testimony of Louie Fung On with regard to the date of his alleged brother's birth does not accord with the statements of others, but it does not for that reason discredit the texture of the rest of the testimony. * * *"

Yee Doo Yen v. Tillinghast, No. 4486-Civil, D. C. of Mass., supra;

Flynn ex rel. Chin She Yin v. Tillinghast, 56 Fed. (2d) 317, C. C. A. 1st, supra;

Jew Yut Chew v. Tillinghast, 25 Fed. (2d) 886, D. C., supra;

Moy Fong v. Tillinghast, 33 Fed. (2d) 125, D. C., supra;

U. S. ex rel. Ng Kee Wong v. Day, 44 Fed. (2d) 406, D. C., supra.

But, entirely aside from the coroboration, which came from the appellant's alleged husband and the unrelated witness, Au Yeung Shee, the appellant's testimony was corroborated by certain documents, which the immigration authorities arbitrarily ignored. First,

as alleged in the petition for a writ of habeas corpus (Tr. of R., p. 11), there was a marriage certificate disclosing that the appellant and her alleged husband were married. This document is mentioned by the Secretary of Labor in his decision, supra, as a "three generation paper" and the Secretary of Labor disposes of this material evidence by stating "that in the fraudulent case of the alleged husband's alleged mother's attempt to enter in 1923 similar three-generation papers were presented". (Tr. of R., p. 29.) Wherein the similarity obtains the Secretary of Labor does not specify, as, indeed, he could not, in that the documents were in the Chinese language and no translation was ever made. In any event, although the documents may have been similar to those presented in 1923 by the appellant's husband's alleged mother, nevertheless, it is hardly fair or reasonable to the appellant to hold that the particular documents, which she presented, were fraudulent. Citation of authority is hardly necessary to show that a certificate of marriage constitutes important evidence as to the fact of marriage.

The other document, which was ignored, consisted in a report by the American Consul, as follows:

> "The applicant is proceeding to the United States as the wife of a lawfully domiciled treaty merchant, Kwan Tow (Too), who is the holder of a merchant's Return Permit No. 675989, dated January 22, 1931, and who is connected with the Golden State Meat Market at 916 H Street, Modesto, California. The couple was married according to Chinese custom on April 6, 1931, and

various witnesses have testified satisfactorily to this office as to the legality of the marriage."

(Original Immigration Record No. 807/428, second from last page.)

Under Section 2 of the Immigration Act of 1924, 8 U. S. C. A., Sec. 202, it is the function of consular officers to issue immigration visas to aliens, who are about to proceed to the United States and it is expressly provided that no immigration visa shall be issued "if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws". Thus, in accordance with his statutory duty, the American Consul, in order to ascertain that the appellant was eligible for admission to the United States, caused an investigation to be made and procured the testimony of witnesses in China as to the existence of the relationship between the appellant and her alleged husband. His report to the effect that his investigation, as the result of having obtained the testimony of witnesses, established the existence of the relationship is something more than a mere statement of claim as to the status under which the appellant would be admissible to the United States. It is the statement of the ascertainment of a fact by a coordinate officer of the government in pursuance of official duty.

While we do not claim that the immigration authorities were in any manner bound to accept the consular report as conclusive upon the question of whether or

not the appellant is the wife of her alleged husband, nevertheless, we submit that the report furnished some evidence to corroborate the appellant's claim.

The Courts have time and time again sanctioned the use as evidence by immigration authorities of letters and cablegrams from consular officers, as well as reports and affidavits, both official and unofficial.

Li Bing Sun v. Nagle, 56 Fed. (2d) 1000, C. C. A. 9th;

White v. Backus, 213 Fed. 768, C. C. A. 9th;

U. S. v. Uhl, 215 Fed. 573, C. C. A. 9th;

Healy v. Backus, 221 Fed. 358, C. C. A. 9th;

Choy Gum v. Backus, 223 Fed. 487, C. C. A. 9th.

Moreover, inasmuch as the report disclosed that the consul had in his possession the evidence, upon which the report was based, the immigration authorities could not ignore the report, until they had, at least, secured the evidence from the consul and reviewed it.

U. S. ex rel. Schachter v. Curran, 4 Fed. (2d) 356, C. C. A. 3rd.

CONCLUSION.

In view of the foregoing considerations, we submit that the denial of the claim of the appellant to be the wife of her alleged husband has been so arbitrary and unfair as to constitute a denial of a fair hearing.

It is respectfully asked that the order of the Court below be reversed, with directions to issue a writ of habeas corpus as prayed for.

Dated this 10th day of November, 1932.

Respectfully submitted,

STEPHEN M. WHITE,
576 Sacramento, Street,
San Francisco, California,
Attorney for Appellant.

No. 6941

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

NGAI KWAN YING,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

GEO. J. HATFIELD,
United States Attorney,

I. M. PECKHAM,
Asst. United States Attorney,
Attorneys for Appellee.

ARTHUR J. PHELAN,
United States Immigration Service, on the Brief.

Parker Printing Company, 545 Sansome Street, San Francisco.

Subject Index

Table of Authorities Cited.

No. 6941

IN THE

United States Circuit Court of Appeals

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NGAI KWAN YING,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This appeal is from an order of the District Court for the Northern District of California, denying appellant's petition for a writ of habeas corpus (Tr. 59).

FACTS OF THE CASE.

Appellant is a Chinese girl, seventeen years old (Tr. 27). She claims to be the wife by a marriage contracted in China on April 6, 1931 of Kwan Tow, a

Chinese merchant residing in the United States. Her application for admission to the United States was denied by a Board of Special Inquiry for failure to establish that claim satisfactorily (Tr. 16 to 26, inclusive). That decision was affirmed on appeal by the Secretary of Labor (Tr. 27 to 30, inclusive).

Testimony before the Board was given by appellant, by her alleged husband, and by one Au Yeung Shee.

The excluding decision is based primarily upon the following points, among others:

1. That the alleged husband is discredited as a witness because of his fraudulent attempt in 1923 to bring in as his mother a prostitute who had been deported, and as his sister a seventeen year old impostor.

2. That Au Yeung Shee is discredited as a witness because of having given false testimony when she herself was applying for admission in 1931.

3. That appellant and her alleged husband contradict each other regarding the single visit which it is claimed the latter made to appellant's home village in China two months before the hearing.

4. That the testimony is in conflict regarding an alleged meeting between appellant and Au Yeung Shee in Canton City three months before the hearing, particularly regarding whether Au Yeung Shee was then accompanied by her children.

ARGUMENT.

1. THE ADMINISTRATIVE DECISION WAS NEITHER ARBITRARY NOR UNFAIR.

This is another of the innumerable cases which burden the calendars of this Court at every term, involving merely the weight of the evidence before the administrative tribunals and the credibility of the witnesses heard by them.

Of course, the question here is not whether the executive decision is right or wrong, nor whether the Court with the same facts before it might reach a different conclusion, but simply whether the administrative officers acted arbitrarily or unfairly.

> *Louie Lung Gooey v. Nagle* (C. C. A. 9), 49 Fed. (2d) 1016.

(a) The credibility of the alleged husband.

Certainly there was ample evidence before the Board that in 1923 appellant's alleged husband gave false testimony (reiterated by him in connection with the present application) when he testified that the woman and girl then applying for admission were his mother and sister respectively and that the woman was not the person who was deported as a prostitute in 1918 and had never been in the United States before (Tr. 32 to 34, inclusive).

The woman admitted that she is not Kwan Tow's mother, that she is the woman who was deported as a

prostitute in 1918, and that the young girl applying for admission with her was not her daughter (Tr. 41 and 42). Her testimony was fully corroborated by Miss Katherine R. Maurer, Deaconess of the Methodist-Episcopal Church, 655 Stockton St., San Francisco, who identified her as the prostitute who had been deported and who pending deportation had been paroled to the Methodist-Episcopal Home (Tr. 39 to 41, inclusive). The young Chinese girl who appellant's alleged husband claims is his sister testified that she did not know him and had never seen him before (Tr. 38 and 39).

We might also mention that while appellant's alleged husband testified in connection with the present application that his mother died February 12, 1931 and that his sister was married on November 14, 1926 and shortly thereafter went to the Straits Settlements (Tr. 37), his brother testified as recently as March 11, 1931, that both his mother and his sister were living in the home village in China, and that the sister had never been married (Tr. 43).

On such a record, the immigration authorities were certainly not arbitrary in declining to credit the testimony of the alleged husband in connection with the present application.

Quan Wing Seung v. Nagle, (C. C. A. 9), 41 Fed. (2d) 58;

U. S. ex rel Fong Lung Sing v. Day (C. C. A. 2), 37 Fed. (2d) 36;

U. S. ex rel Soy Sing v. Chinese Inspector (C. C. A. 2), 47 Fed. (2d) 181, at 183 and 184.

Appellant attempts to distinguish the first two cases just cited on the ground that in those cases the previous false testimony was given at hearings involving substantially the same issue as that involved in the later application.

There is no such distinction. In the *Quan Wing Seung* case the alleged father had previously attempted to bring in a son born in 1906, although he had testified in 1911 that he had no children. This did not directly affect the validity of Quan Wing Seung's claim because, according to the record, he was born after 1911. Hence, the previous false testimony in that case did not touch the particular issue involved in the application of Quan Wing Seung. Nevertheless, this Court said:

> "The record is replete with alleged discrepancies *but in view of the false testimony given by the father in an effort to secure the admission of an alleged son* we cannot say that a fair hearing was denied because the immigration authorities did not believe his testimony in the present instance."

Likewise, in the *Fong Lung Sing* case, supra, the Court, in discussing the attempted fraud shown in the prior records, said:

> "It is quite true that these do not directly affect the paternity of the applicant who as we have said was not born in 1911 when the relator testified * * *."

The Court went on to say that the Board might properly have concluded that the alleged father and alleged brother had once tried to run in an impostor and therefore that the applicant's claim was doubtful.

Likewise, in the *Soy Sing* case, supra, it is sufficient to quote from the Court's opinion:

> "At both hearings, however, he testified that he was the father of the applicant, and none of the contradictory evidence he gave directly indicates the contrary; yet it does indicate his general untruthfulness, his willingness to testify falsely, and leaves his credibility so impaired that to hold the Board of Inquiry unfair in failing to rely upon it would be an unwarranted invasion of the right of the examiners to be exclusive judges of the credibility of the witnesses who testify before them, and, having reasonable grounds for their conclusion, to decide that this witness was unworthy of belief. This left the testimony of the applicant virtually unsupported, and it is impossible to say that the Board was unfair in holding it to be less than enough. See Ex parte Jew You On (D. C.) 16 F. (2d) 153. It should be remembered that this appeal is not a trial de novo."

It is obvious therefore that appellant's attempted distinction is without substance.

The character and credibility of the witnesses were matters for the consideration of the immigration authorities and their conclusions cannot be disturbed.

> *Wong Shee v. Nagle* (C. C. A. 9), 7 Fed. (2d) 612;

Chin Shee v. White (C. C. A. 9), 273 Fed. 801, at 806.

We might add here that in the case at bar proof of the vital fact that the alleged husband's previous marriage had terminated (*Ng Suey Hi v. Weedin,* 21 Fed. (2d) 801) depends solely upon his own testimony that his first wife died in China on October 26, 1925 (Tr. 51). Since he testified falsely regarding other family matters, viz., regarding his alleged mother and sister, we submit that the immigration authorities were not compelled to believe his testimony that his first wife had died.

Weedin v. Ng Bin Fong (C. C. A. 9), 24 Fed. (2d) 821.

The burden of appellant's complaint is that the testimony discrediting the veracity of the alleged husband was given in connection with other applications for admission to which she was not a party.

That situation likewise existed in the cases which we have cited above.

Nothing is better settled than that the immigration officers in these administrative proceedings are not bound by judicial standards, nor by judicial rules of evidence.

Bilokumsky v. Tod, 263 U. S. 149, at page 157;
Ghiggeri v. Nagle (C. C. A. 9), 19 Fed. (2d) 875;
U. S. ex rel. Smith v. Curran (C. C. A. 2), 12 Fed. (2d) 636;

Ng Mon Tong v. Weedin (C. C. A. 9), 43 Fed. (2d) 718;

Ex parte Shigenari Mayemura (C. C. A. 9), 53 Fed. (2d) 621.

It is equally well settled that the immigration officers may at all times consider the contents of their official records.

Tang Tun v. Edsell, 223 U. S. 673, at 681;

Chin Shee v. White (C. C. A. 9), 273 Fed. 801, at 804;

Moy Yoke Shue v. Johnson, 290 Fed. 621, at 623.

In

Wong Foo Gwong v. Carr, 50 Fed. (2d) 360,

this Court said:

> "It is a well established rule in cases of this kind that it was not improper for the immigration officials to refer to their past records in order to determine the weight to be given to the testimony of the alleged father * * *."

In

Tang Tun v. Edsell, supra,

the immigration authorities considered records relating to the admisssion of other Chinese entirely unconnected with the applicant.

In

Moy Yoke Shue v. Johnson, supra,

testimony was considered which had been given by an acquaintance of the applicant's alleged father in

connection with the application of the son of the acquaintance.

Likewise, in

Wong Heung ex rel. Wong Yut Din v. Johnson (C. C. A. 1), 21 Fed. (2d) 826,

it was held that the Board properly considered testimony of an alleged uncle and two alleged nephews, given in an earlier proceeding not involving the applicant.

None of the cases which appellant cites as authority for his contention is in point. All those cases were judicial proceedings, except those cited at the foot of page 15 of appellant's brief, in which cases it was shown that the statements relied upon as contradicting the witnesses were due to misunderstanding or mistake, and except

Gung You v. Nagle, 34 Fed. (2d) 848,

in which there was no evidence whatsoever that any of the witnesses had given false testimony at any time. This is true also of the cases cited at pages 22 and 36 of appellant's brief.

There was no inconsistency in conceding that the alleged husband is the son of Kwan Chong and nevertheless holding that he testified falsely regarding the two women who applied for entry in 1923. Kwan Chong has never denied that the alleged husband is his son, whereas the woman and girl who applied in 1923 denied that they are his mother and sister respectively, and his testimony in that respect is also refuted by the testimony of Miss Maurer.

Obviously, the case of

Wong Dock v. Nagle, 41 Fed. (2d) 476,

wherein the immigration authorities held on two occasions that the alleged father was lawfully married, and on another occasion on the same evidence that he was not, bears no similarity to the case at bar.

We submit that the immigration authorities were neither arbitrary nor unfair in concluding that appellant's alleged husband is unworthy of belief.

(b) The credibility of Au Yeung Shee.

The witness Au Yeung Shee is alleged to have attended one of the wedding banquets held the day after the alleged marriage of appellant April 6, 1931 (Tr. 5, 20, 56), and to have also seen appellant and her alleged husband in Canton City on one occasion in October, 1931 (Tr. 11, 56, 57). Her testimony is not at all conclusive upon the issue and her credibility is seriously impaired.

Appellant, at page 27 of her brief, states that the testimony "leaves considerable doubt" that this witness did give false testimony when she herself applied for admission in November, 1931.

Of course, even a considerable doubt would not justify interference with the executive decision. Moreover, we see no doubt at all on this point. The readmission of the witness in November, 1931, depended upon a showing that she had property or debts due her in the sum of $1000, or certain relatives in the

United States (8 U. S. C. A., Sec. 276). She originally based her application on an alleged bank deposit in the statutory sum (Tr. 44). She repeatedly denied having signed a note to the bank with the account as collateral for a loan (Tr. 44, 45). Her husband, however, admitted that $800.00 had been borrowed from the bank, that she pledged her bank account as security for this loan, and that she signed a note for $800.00 in favor of the bank (Tr. 47 to 50, inclusive). Au Yeung Shee then finally admitted that she and her husband had gone to the bank, and that she had signed this note (Tr. 45 and 46).

Appellant claims that Au Yeung Shee was finally admitted into the United States by the Secretary of Labor on appeal and, hence that the false testimony given by Au Yeung Shee must be considered as immaterial.

Of course, the fact that Au Yeung Shee may have had another statutory exemption entitling her to enter, and that the false testimony may have been unnecessary to accomplish the end in view, does not render the false testimony immaterial.

> 48 *C. J.*, page 836;
> *State v. Berliawsky,* 106 Me. 506, 76 A. 938;
> *Gordon v. State,* 158 Wis. 32, 34, 148 N. W. 998.

Moreover, there are other factors detracting from the credibility of Au Yeung Shee.

Au Yeung Shee's testimony is that although she was about eight months pregnant at the time of the wed-

ding banquet she walked to and from her home village (a distance of about four miles each way) to attend that banquet (Tr. 10, 20). Regarding her other asserted meeting with appellant in Canton City three months before the hearing, she and appellant are in flat conflict as to whether she had her three children with her or only one of them (Tr. 56, 57, 58). There is also contradiction between this witness and appellant's alleged husband as to whether the latter accompanied her from the hotel to the boat upon which she left Canton City (Tr. 21 and 22), and likewise disagreement between them regarding whether or not there are kitchens in the ancestral hall where the alleged wedding banquet is said to have been held (Tr. 22).

We think that this shows considerable disagreement in view of the fact that the testimony of this witness is limited to only the two meetings, both within a few months of the examination.

Regarding the fairness of the action of the immigration authorities in viewing the credibility of this witness with doubt, the authorities we have cited above regarding the credibility of appellant's alleged husband are equally applicable here.

(c) The appellant's testimony.

There is a serious conflict between appellant and her alleged husband regarding the single visit which it is asserted the latter made to the home village of appellant. Both parties testify that such a visit occurred on November 14, 1931, two months before the hearing.

The alleged husband testified that he did not go with appellant, that each went alone, that when he arrived she was already there, and that they did not come back together but that he came home first (Tr. 53). Appellant testified that they walked to her home village together, that they left home together and arrived at her parents' home together, and that they walked back home together (Tr. 54).

The examination of each on this point could not possibly be more definite. The testimony of each is positive and unambiguous. It is significant that each party remembers the exact date on which the visit is alleged to have occurred and hence there could be no failure of recollection as to whether they went together or separately. The distance is said to be about three miles each way (Tr. 7) and it is claimed that this was the only occasion upon which the alleged husband visited the parents of appellant. Such an occasion should be impressed upon the memory of both.

Wong Hai Sing v. Nagle (C. C. A. 9), 47 Fed. (2d) 1021, at page 1023, column 1.

In any event the testimony of the applicant herself would be insufficient to impel a finding of the claimed relationship.

Weedin v. Ng Bin Fong (C. C. A. 9) 24 Fed. (2d) 821, supra;

Wong Fat Shuen v. Nagle (C. C. A. 9), 7 Fed. (2d) 611;

Tillinghast v. Flynn, 38 Fed. (2d) 5;

U. S. ex rel Fong Lung Sing v. Day, supra;
U. S. ex rel Soy Sing v. Chinese Inspector, supra.

In

Tang Tun v. Edsell, supra

the Supreme Court said:

> "There remained the testimony of Tang Tun himself, but this, with all the other evidence in the case, was for the consideration of the officers to whom Congress had confided the matter for final decision."

We know of no case holding that the immigration authorities are compelled as a matter of law to accept as sufficient proof the testimony of the applicant alone even if there are no contradictions.

All the cases cited by appellant either relate to judicial proceedings and not habeas corpus proceedings, or do not touch the point at all.

Appellant refers to a "three generation paper" which is also alluded to by her as a "marriage certificate", an easily manufactured document, like the "pedigree" of a Belgian hare.

There is nothing official about such a document (**Tr.** 25 and 26) even if its authenticity were established. Similar papers were presented by the impostor whom appellant's alleged husband attempted to pass off as his mother in 1923 (Tr. 26). Similar papers were also presented in the case of

Lee Shee v. Nagle (C. C. A. 9), 22 Fed. (2d) 107,

wherein the judgment denying the petition for writ of habeas corpus was affirmed.

The issuance to appellant by the American Consular officer of a visa to enable her to proceed to the United States and apply for admission is entirely immaterial here. The American Consular officers are without authority to determine the right to enter the United States.

8 U. S. C. A. Sec. 202 (g);

Wong Ock Jee v. Weedin (C. C. A. 9), 24 Fed. (2d) 962;

Takeyo Koyama v. Burnett (C. C. A. 9), 8 Fed. (2d) 940;

Ex parte Jeu Haw Bong, 29 Fed. (2d) 793;

Keating ex rel Mello et al. v. Tillinghast, 24 Fed. (2d) 105;

U. S. ex rel Alexandrovich v. Commissioner of Immigration, 13 Fed. (2d) 943.

In

U. S. ex rel Schachter v. Curran, 4 Fed. (2d) 356,

cited by appellant, the record showed that the documents establishing the relator's non-quota status had been taken up and retained by the American Consul abroad who gave him the visa. In that case said documents were indispensable to a determination of the issue.

2. THE CREDIBILITY OF THE WITNESSES AND THE WEIGHT OF THE EVIDENCE WERE EXCLUSIVELY FOR THE DETERMINATION OF THE IMMIGRATION AUTHORITIES.

In

Tulsidas v. Insular Collector of Customs, 262 U. S. 258,

the Supreme Court has pointed out that the law, in administration of its policy, has appointed officers to determine the merits of these cases "on practical considerations", and that the Courts should

> "leave the administration of the law where the law intends it should be left; to the attention of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion."

The Court also pointed out at page 265 that the judgments of those officers is based on their knowledge of the conditions obtaining, on their contact with the applicant, and on their estimate of the appellant's claims, and went on to say:

> "And necessarily, we should not view the spoken word, nor even the partnership agreement produced in support of the spoken word, separate from that contact and that estimate."

Appellant has rested all her principal contentions upon authorities pertaining to judicial proceedings and judicial standards. This case was an administrative hearing freed from those restrictions.

We submit that the decision of the Court below denying the petition for writ of habeas corpus should be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

I. M. PECKHAM,
Asst. United States Attorney,
Attorneys for Appellee.

ARTHUR J. PHELAN,
United States Immigration Service,
on the Brief.

No. 6943

United States
Circuit Court of Appeals
For the Ninth Circuit.

PLYMOUTH OIL COMPANY, a corporation,
Plaintiff,

vs.

McKEON OIL COMPANY, a corporation,
Defendant.

LEWIS J. HAMPTON, Receiver in Equity of W. M. Pergellis, Trustee,
Petitioner and Appellant,

vs.

GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation,
Respondent and Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
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PLYMOUTH OIL COMPANY, a corporation,
Plaintiff,

vs.

McKEON OIL COMPANY, a corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

INDEX TO EXHIBITS.

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For respondent and appellee:

IVAN G. McDANIEL, ESQ.,
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Title Insurance Building,
Los Angeles, California.

UNITED STATES OF AMERICA, SS.

TO RESPONDENT, GEORGE H. STODDARD, Receiver in Equity for McKEON OIL COMPANY, a corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 26th day of August, A. D. 1932, pursuant to Order allowing Appeal filed on the 28th day of July, 1932, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, Central Division, in that certain cause numbered Equity U-14-C, entitled Plymouth Oil Company, a corporation, Plaintiff, vs. McKeon Oil Company, a corporation, Defendant (Sub-Caption) Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. George H. Stoddard, Receiver in Equity for McKeon Oil Company, a corporation, Respondent, wherein Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee is appellant, and you are appellee, to show cause, if any there be, why the said Order in the said Appeal mentioned, should not be reversed, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable George Cosgrave, United States District Judge for the Southern District of California, Central Division, this 28th day of July, 1932, and of the Independence of the United States, the one hundred and fifty-seventh.

Geo. Cosgrave
U. S. District Judge for the Southern District of California, Central Division.

[Endorsed]: Original Equity No. U-14-C In the United States District Court in and for the Southern District of California Central Division Plymouth Oil Company A corporation Plaintiff vs. McKeon Oil Company A corporation Defendant Received copy of the within Citation this 29 day of July 1932 Ivan G. McDaniel-D Attorney for Respondent Filed Jul 29 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk William Hazlett and Edna Covert Plummer 918 Security Building Fifth and Spring Streets Los Angeles, California Telephone Tucker 6506 Attorneys for Petitioner

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation, Defendant.	In Equity No. U-14-C
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pergellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	PETITION FOR ORDER TO SHOW CAUSE RE: RESTORATION OF POSSESSION OF REAL PROPERTY.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES:

Now comes Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, and respectfully represents in petition:

I.

That sometime prior hereto, and on or about the 18th day of September, 1923, Theodore C. Reid, Joseph J.

Berliner, Genevieve V. Reid and Mabel E. Berliner, as individuals and as co-partners doing business under the fictitious name of Reid and Berliner; R. F. B. Drilling Co. Inc., a corporation; Are-Bee Oil Syndicate, a trust estate; Reid & Berliner Inc., a corporation; M. A. Campbell, Nellie L. Campbell; Theodore C. Reid, Genevieve V. Reid, M. A. Campbell and Nellie L. Campbell, as co-partners doing business under the fictitious name of Reid & Campbell; Reid & Berliner, a co-partnership and Reid & Campbell, a co-partnership, in writing and for value, assigned, transferred and set over to one W. M. Pergellis all of their right, title and interest in and to that certain oil and gas lease dated November 7th, 1922, between W .A. Swem and Bertha M. Swem and others, as lessors, and C. H. Nickell as lessee, recorded December 6th, 1922, in Book 1620 page 176 of Official Records of the County of Los Angeles, State of California, and mentioning that certain property located in the Santa Fe Springs Oil District in the County of Los Angeles, State of California, and more particularly described as:

Lots 22 and 24 of Blanchard's subdivision as per map recorded in Book 18 at page 69 Miscellaneous Records of said county.

II.

Contemporaneously with the consummation of the transaction outlined above, Prudential Finance Co., a corporation; Reid & Berliner, a copartnership, F. R. B. Drilling Co. Inc., a corporation, Reid & Campbell, a copartnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, made, executed and delivered to the Citizens Trust and Savings Bank of Los Angeles, certain written escrow instructions under and by virtue

of the terms of which, among other things the said W. M. Pargellis was constituted and appointed trustee of said oil and gas lease, so assigned as aforesaid, for the benefit of the said Prudential Finance Co., a corporation, Reid & Berliner, a copartnership, F. R. B. Drilling Co., Inc., a corporation, Reid & Campbell, a copartnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation.

III.

Thereafter, the said W. M. Pargellis, trustee as aforesaid, and the said Prudential Finance Co., a corporation, Reid & Berliner, a copartnership, F. R. B. Drilling Co., Inc., Reid & Campbell, a copartnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, as aforesaid, sold or caused to be sold for valuable considerations and to divers and sundry persons certain interests in and to said trust estate or in and to the oil and gas to be produced, saved or sold from said premises.

IV.

On or about the 25th day of April, 1930, the said W. M. Pargellis caused a suit to be instituted in the Superior Court of the State of California in and for the County of Los Angeles, entitled W. M. Pargellis, also known as Wright M. Pargellis, Plaintiff, vs. McKeon Oil Company, a corporation, et al., Defendants, and being case No. 301667 in the office of the Clerk of said Court, for the purpose of allegedly determining certain alleged adverse claims in and to oil and gas produced, saved or sold from said premises, and thereafter such proceedings were had in said matter in said Superior Court that on

the 2nd day of November, 1931, the said Superior Court duly made and entered its order, among other things, appointing your Petitioner herein, Lewis J. Hampton, Receiver in Equity pendente lite in said matter with full powers, and ever since his said appointment as aforesaid your petitioner has been and now is the duly qualified and acting Receiver in Equity in said matter.

V.

Heretofore and some time subsequent to the 27th day of August, 1928, the said McKeon Oil Company, a corporation, the same party as the party defendant in the above-entitled matter, without any right or authority whatsoever and contrary to the wishes, desires and permissions of Petitioner or of Prudential Finance Co., a corporation, Reid & Berliner, a copartnership, F. R. B. Drilling Co. Inc., a corporation, Reid & Campbell, a copartnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner Inc., a corporation, or any of them, or anyone for them and without any right or authority whatsoever and contrary to the wishes, desires and permissions of said purchasers and holders of interests in and to said trust estate or in and to oil and gas produced, saved or sold from said premises, or any of them, or any one of them, took possession of, assumed control of and occupied a portion of the above mentioned premises which said portion is described as follows:

East 100 feet of Lot 24 of Blanchard's Subdivision in the Rancho Santa Gertrudes, County of Los Angeles, State of California, as per map recorded in Book 18, Page 69 of Miscellaneous Records in the office of the County Recorder of said County.

VI.

Thereafter, and having so taken possession of, assumed control of and occupied said portion of said premises as aforesaid, said McKeon Oil Company without any right or authority whatsoever and contrary to the wishes, desires and permissions of said petitioner or of Prudential Finance Co., a corporation, Reid & Berliner, a copartnership, F. R. B. Drilling Co. Inc., a corporation, Reid & Campbell, a copartnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner Inc., a corporation, or of the purchasers and holders of interests in and to said trust estate or in and to oil and gas produced, saved or sold from said premises, or any of them, or anyone for them, drilled or caused to be drilled an oil well on said premises and placed said well on production, and ever since said well was so placed on production, the said McKeon Oil Company has been and to the time of the appointment of the Receiver by this court as hereinafter mentioned, was so producing, saving and selling oil and gas from said well so drilled by it as aforesaid.

VII.

Subsequently, and on the 4th day of June, 1931, this Court, by its order, duly made and entered in the above entitled matter, appointed George H. Stoddard, Respondent herein, as the Receiver in Equity therein, with full powers; and ever since his said appointment the said respondent has been and is yet the duly qualified and acting Receiver in Equity in said matter and as such and

in the regular course of his administration of said Receivership Estate of the said McKeon Oil Company, said respondent has taken possession and control of all of the assets of the said McKeon Oil Company, including particularly the premises hereinabove referred to, and ever since has possessed and controlled and even now possesses and controls said premises and has been and now is producing, saving and selling oil and gas from the said well on said premises against the wishes, desires and permissions of Petitioner or of Prudential Finance Co., a corporation, Reid & Berliner, a copartnership, F. R. B. Drilling Co. Inc., a corporation, Reid & Campbell, a copartnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner Inc., a corporation, or of the purchasers and holders of interests in and to said trust estate or in and to oil and gas produced, saved or sold from said premises, or any of them, or anyone for them, and unless interfered with by order of this court, the said respondent receiver will so continue to possess and control said premises and to produce, save and sell oil and gas therefrom to the great and irreparable damage to petitioner's receivership estate, to the premises herein mentioned and to the purchasers and holders of interests in and to said trust estate or in and to oil and gas produced, saved and sold from said premises.

VIII.

Although demand has been repeatedly made upon the said respondent receiver and upon McKeon Oil Company

for restoration of possession and control of said premises to petitioner and an accounting for all of the oil and gas produced, saved or sold from said premises by said respondent receiver and McKeon Oil Company, said demands have been unheeded and uncomplied with by either said respondent receiver or McKeon Oil Company and petitioner has been obliged to supplicate relief in this court.

IX.

Petitioner has no plain, speedy or adequate remedy at law in the premises and the equity of this court affords petitioner his only relief.

WHEREFORE, Petitioner respectfully prays that an order to show cause be issued out of and under the seal of this court directed to respondent receiver to show cause, if any he has, why the possession and control of the premises hereinabove mentioned should not be restored to petitioner herein; and, why said respondent receiver should not account to petitioner for all of the oil and gas produced, saved or sold from said premises; and, why this court should not grant to petitioner whatsoever other relief this court might deem equitable in the premises.

Lewis J. Hampton
Petitioner

William Hazlett
Edna Covert Plummer
Robert J. Sullivan
Attorneys for Petitioner

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA)
CENTRAL DIVISION)

LEWIS J. HAMPTON, being by me first duly sworn, deposes and says: That he is the Petitioner in the above entitled matter; that as such he has heard read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

Lewis J. Hampton
PETITIONER

Subscribed and sworn to before me this 13 day of May, 1932.

[Seal] Edna Covert Plummer,
Notary Public in and for Los Angeles
County, State of California.

[Endorsed]: Original In Equity In the United States District Court In and for the Southern District of California Central Division Plymouth Oil Company, a corporation, Plaintiff, vs. McKeon Oil Company, a corporation, Defendant Lewis J. Hampton, Receiver in Equity etc., Petitioner vs. George H. Stoddard, Receiver etc. Respondent. Petition For Order To Show Cause Re: Restoration Of Possession Of Real Property Filed May 13 1932 R. S. Zimmerman, Clerk By C. A. Simmons Deputy Clerk William Hazlett and Edna Covert Plummer 918 Security Building Fifth and Spring Streets Los Angeles, California Telephone Tucker 6506 and Robert J. Sullivan Attorneys for Petitioner

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

Plymouth Oil Company a corporation, Plaintiff, vs. McKeon Oil Company, a corporation, Defendants	No. U-14-C.
— — — —	MOTION TO DISMISS PETITION OF LEWIS J. HAMPTON AND ORDER TO SHOW CAUSE THEREON.
Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. George H. Stoddard, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	

TO LEWIS J. HAMPTON, AND TO HAZLETT & PLUMMER, HIS ATTORNEYS:

Take notice that George H. Stoddard, receiver of McKeon Oil Company, does hereby and will again on Monday, May 23, 1932 at the hour of 2:00 p. m., move the above entitled Court to dismiss the petition of Lewis J. Hampton filed in the above entitled action.

Said motion will be made upon the ground and for the reason that said petition does not allege facts sufficient to warrant the granting of any relief and upon the ground that the facts set forth in said petition even if true would not warrant the granting of any relief to said petitioner.

Said motion will be based upon this notice of motion and all the records and files in the above entitled matter.

DATED: May *May* 19, 1932.

IVAN G. McDANIEL
By Spencer Austrian
Attorney for George H. Stoddard, receiver.

[Endorsed]: No. U-14-C In the United States District Court In and for the Southern District of California Central Division Plymouth Oil Company a corporation vs. McKeon Oil Company a corporation Motion to Dismiss Petition of Lewis J. Hampton and Order to Show Cause Thereon Received copy of the within this 19 day of May 1932 Hazlett & Plummer Attorney for Lewis Hampton Receiver Filed May 20 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk Ivan G. McDaniel Attorney at Law 642 Title Insurance Building Los Angeles, Cal. Mutual 7394 Attorneys for receiver of McKeon Oil Co.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation, Defendant. ——— LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	In Equity No. U-14-C ORDER DENYING MOTION TO DISMISS PETITION.

The motion of GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, to dismiss the petition of Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, on file herein, came on regularly for hearing before the Honorable George

Cosgrave, Judge of the above-entitled court on the 23rd day of May, 1932; Spencer Austrian, Esq., appearing for the moving party on said motion to dismiss; and, Robert J. Sullivan, Esq., appearing for petitioner; and, the said motion to dismiss having been argued by counsel and the matter submitted to the said court for decision;

IT IS HEREBY ORDERED that the said GEORGE H. STODDARD'S motion to dismiss petitioner's petition be, and the same is hereby denied and the said George H. Stoddard is hereby directed to file his answer to said petition in reasonable time hereafter.

Dated May 31, 1932.

Geo Cosgrave
Judge.

[Endorsed]: Original No. U-14-C In the United States District Court In and for the Southern District of California Central Division Plymouth Oil Company, a corp., Plaintiff, vs. McKeon Oil Company, a corp., Defendant. Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner vs George H. Stoddard, etc., Respondent. Order Denying Motion to Dismiss Petition Filed May 31 1932 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk William Hazlett and Edna Covert Plummer 918 Security Building Fifth and Spring Streets Los Angeles, California Telephone Tucker 6506 and Robert J. Sullivan Attorneys for Lewis J. Hampton, Receiver

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation, Defendant.	No. U-14-C AMENDED ANSWER TO PETITION of LEWIS J. HAMPTON

Comes now George H. Stoddard and files this amended answer to the petition of Lewis J. Hampton in the above entitled matter, and admits, alleges and denies as follows:

I.

Answering the allegations of Paragraph I admit that Theodore C. Reid and Genevieve V. Reid, his wife, and Joseph J. Berliner and Mabel E. Berliner assigned said lease as hereinafter set forth and deny every other allegation contained in said paragraph.

II.

Respondent has not information and belief sufficient to enable him to answer the allegations of Paragraph II thereof and basing his answer upon that ground, denies each and every allegation therein contained.

III.

Answering the allegations of Paragraph III thereof admit that instruments were sold purporting to authorize the holder to an undivided portion of the proceeds received

from the sale of oil and deny every other allegation contained in said paragraph.

IV.

Answering the allegations of Paragraph IV thereof, admits the pendency of the suit therein referred to but alleges that the purpose thereof was solely to determine the ownership of certain funds now impounded by the clerk of said court. Further answering the allegations of said paragraph admits that said Lewis J. Hampton was appointed a receiver in said action but denies that he was duly or regularly appointed and alleges that said court had no jurisdiction or power to appoint him as said receiver and further alleges that the order appointing him as said receiver is void upon its face and further alleges that said Lewis J. Hampton was not appointed receiver of the real property described in said petition, and that any order attempting to appoint him as receiver thereof is void.

V.

Answering the allegations of Paragraphs V, VI and VII thereof, admits that your receiver is now in possession of the realty therein described but denies that said possession is without right and alleges in connection therewith that at all times mentioned in said petition and in this answer thereto that W. M. Pargellis was and now is the legal owner of said oil lease and that the record title thereto stands in the name of W. M. Pargellis.

That prior to November 7, 1922, W. A. Swem, Bertha M. Swem, Roy L. Brown, Nellie Brown, Lester R. Godward, Helen P. Godward, Michael Rudolph and Lillian F. Rudolph were the owners of and entitled to the possession of the realty described in the petition of Lewis

J. Hampton. That on November 7, 1922 said persons leased said property and other property to C. H. Nickell by a written lease recorded in Book 1620, Page 176 of Official Records of Los Angeles County. That thereafter and on February 21, 1923 said C. H. Nickell assigned his interest under said lease to Theodore C. Reid and Joseph J. Berliner which assignment was recorded March 19, 1923 in Book 2035, Page 211 of Official Records of Los Angeles County. That thereafter and on August 23, 1923 said Theodore C. Reid and Joseph J. Berliner assigned their interest under said lease to W. M. Pargellis which assignment was recorded in Book 2748, Page 127 of Official Records of Los Angeles County. That thereafter and on August 27, 1928 said W. M. Pargellis subleased the property referred to in the petition of Lewis J. Hampton to Plymouth Oil Company, a Nevada Corporation, by a lease dated on said date and recorded on Sept. 26, 1928, in Book 7262, Page 166, of Official Records of Los Angeles County. That thereafter and on September 11, 1928 said Plymouth Oil Company did by an instrument in writing assign all its right and title in said lease to McKeon Drilling Co., Inc., a California corporation, which assignment was recorded in Book 7264, Page 164, of Official Records of Los Angeles County. That thereafter such proceedings were had in the Superior Court of the State of California in and for the County of Los Angeles, that said court did on March 4, 1929 enter a decree changing the name of

McKeon Drilling Co., Inc. to Raleigh Oil Company. That thereafter the Articles of Incorporation of Raleigh Oil Company were duly and regularly amended so as to change the name of Raleigh Oil Company to McKeon Oil Company. That thereafter the above entitled action was commenced against McKeon Oil Company and such proceedings were had therein that on June 4, 1931 the above entitled court appointed George H. Stoddard, receiver of all of the property and assets of said McKeon Oil Company. That on said day your receiver duly qualified and took possession of all of the assets of McKeon Oil Company including the realty hereinbefore referred to and at all times subsequent thereto has been in possession thereof.

VI.

That said McKeon Oil Company drilled an oil well on the property herein before referred to and expended therefor the sum of $220,825.42. That said well was placed upon production and said McKeon Oil Company paid many thousands of dollars to the persons mentioned in the petition of Lewis J. Hampton, as well as the other persons interested in said well and all of said persons at all times had full knowledge of the facts herein alleged.

WHEREFORE, it is prayed that the petition of Lewis J. Hampton be dismissed.

George H Stoddard
Receiver of McKeon Oil Company

IVAN G. McDANIEL,
By Spencer Austrian
Attorney for said receiver

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

GEORGE H. STODDARD, being by me first duly sworn, deposes and says: That he is the receiver of the McKeon Oil Company, defendant in the above entitled action; that he has read the foregoing Answer to Petition of Lewis J. Hampton, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

George H Stoddard

SUBSCRIBED AND SWORN TO Before me, this 14 day of June, 1932.

[Seal] Spencer Austrian
Notary Public in and for said county and State.

[Endorsed]: No. U-14-C In the United States District Court In and for the Southern District of California Central Division Plymouth Oil Company, Plaintiff, vs. McKeon Oil Company, Defendant Lewis J. Hampton, Receiver etc. Pet. vs. George H. Stoddard, Receiver Respondent Amended Answer to Petition of Lewis J. Hampton Received copy of the within Amended Answer this 16th day of June 1932 Hazlett & Plummer By R. S. Attorney for Petitioner Filed Jun 17 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk Ivan G. McDaniel Attorney at Law 642 Title Insurance Building Los Angeles, Cal. Mutual 7394 Attorneys for receiver, McKeon Oil Co.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation, Defendant.	IN EQUITY NO. U-14-C
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity of McKeon Oil Company, a corporation, Respondent.	FINDINGS OF FACTS and CONCLUSIONS OF LAW IN RE PETITION OF LEWIS J. HAMPTON

BE IT REMEMBERED that a hearing on the petition of LEWIS J. HAMPTON, and the Amended Answer of GEORGE H. STODDARD thereto, filed in the above entitled matter came on for hearing before the above entitled court, the Honorable George Cosgrave presiding, on June 23, 1932, the petitioner Lewis J.

Hampton being represented by Hazlett & Plummer, Esqs. by Robert J. Sullivan, Esq. and the Respondent George H. Stoddard, being represented by Ivan G. McDaniel, Esq. and Spencer Austrian, Esq., and evidence both oral and documentary having been introduced and the court being fully advised in the premises, now makes its Findings of Facts as follows:

FINDINGS OF FACTS

I.

The Court finds that all of the allegations of Paragraph I of said petition are untrue except as hereinafter expressly found. The Court further finds that prior to November 7, 1922, W. A. Swem, Bertha M. Swem, Roy L. Brown, Nellie Brown, Lester R. Godward, Helen P. Godward, Michael Rudolph and Lilliam F. Rudolph, were the owners of and entitled to the possession of the realty described in the petition of Lewis J. Hampton. That on November 7, 1922, said persons leased said property together with other property to C. H. Nickell, for the purpose of explorating for and producing oil therefrom, by written lease recorded in Book 1620, Page 176 of Official Records of Los Angeles County. That thereafter and on February 21, 1923, said C. H. Nickell assigned his interest under said lease to Theodore C. Reid and Joseph J. Berliner, which assignment was recorded on March 19, 1923, in Book 2035, Page 211 of Official Records of Los Angeles County. That thereafter and on August 23, 1923, said Theodore C. Reid and Joseph J. Berliner assigned their interest under said lease to W. M. Pargellis, by an instrument in writing, which was recorded in Book 2748, Page 127 of Official Records of

Los Angeles County. That a true copy of said assignment is attached to the Partial Stipulation of Facts filed in the above entitled matter, and there marked "Exhibit A".

II.

The Court finds that each of the allegations contained in Paragraph II of said petition are untrue except as hereinafter expressly found. The Court further finds that contemporaneously with the assignment of said lease to W. M. Pargellis, as aforesaid, Prudential Finance Co., a corporation, Reid & Berliner, a co-partnership, F. R. B. Drilling Co., Inc., a corporation, Reid & Campbell, a co-partnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, made, executed and delivered to the Citizens National Trust & Savings Bank of Los Angeles, certain written escrow instructions, a copy of which is attached to the Partial Stipulation of Facts, filed in the above entitled action and there marked "Exhibit B". The court further finds that said escrow instructions were the only escrow instructions delivered to said Citizens National Trust & Savings Bank.

III.

The Court finds that each of the allegations contained in Paragraph III of said petition are untrue except as hereinafter expressly found. The Court further finds that thereafter the said Theodore C. Reid and Joseph J. Berliner and their respective wives, sold or caused to be sold, for a valuable consideration, and to divers and sundry persons certain purported interests which were evidenced by instruments all in form similar to a copy of which is attached to the Partial Stipulation of Facts

filed in the above entitled matter and there marked "Exhibit C".

IV. *I.*

The Court finds that each of the allegations contained in Paragraph IV of said petition are untrue except as hereinafter expressly found. The Court further finds that on or about April 25, 1930, said W. M. Pargellis caused a suit to be instituted in the Superior Court of the State of California, in and for the county of Los Angeles, entitled "W. M. Pargellis, also known as Wright M. Pargellis, plaintiff, vs. McKeon Oil Company, a corp., et al., Defendants", and being case No. 301,677, in the office of the Clerk of said Court, a copy of the complaint with the exception of the account which is attached thereto as an exhibit, is attached to the Partial Stipulation of Facts filed in the above entitled action, and there marked "Exhibit G". The Court further finds that said action thereafter proceeded to trial, and during the course of said trial and on November 2, 1931, said Superior Court made an order, a copy of which is attached to the Partial Stipulation of Facts filed herein, and there marked "Exhibit H".

V.

The Court finds that each of the allegations contained in Paragraph V of said petition are untrue, except as hereinafter expressly found. The Court further finds that on or about August 27, 1923, said W. M. Pargellis sub-leased a portion of the premises hereinbefore referred to, to Plymouth Oil Company, a Nevada corporation, by a lease dated on said date and recorded on September 26, 1928, in Book 7262, Page 166 of Official Records of Los Angeles County. That thereafter and from time to time

supplements to said lease were entered into between W. M. Pargellis and McKeon Oil Company. That true copies of said lease and supplemental agreements are attached to the Partial Stipulation of Facts filed in the above entitled action, and there marked "Exhibit E". That prior thereto, and on or about August 11, 1928, said W. M. Pargellis caused to be signed by the various persons who were or claimed to be interested in said property, an instrument in writing, a true copy of which is attached to the Partial Stipulation of Facts filed in the above entitled matter and there marked "Exhibit D". That said instruments were identical in form with the exception of the number of percents expressed therein, and were signed by the persons holding approximately ninety-four percent of the outstanding interests which were sold as aforesaid. That the persons holding the remaining 6% thereof did not sign said documents. That a like number of persons signed written consents to the execution of said supplemental agreements as signed the consent to the original leases. That on September 11, 1928, said Plymouth Oil Company did, by an instrument in writing, assign all of its right, title and interest in and to said lease to McKeon Drilling Company, Inc., a California corporation, which assignment was recorded in Book 7264, Page 164 of Official Records of Los Angeles County. That thereafter the name of McKeon Drilling Company, Inc. was duly and regularly changed to Raleigh Oil Company by decree of the Superior Court of the State of Calfiornia, in and for the County of Los Angeles, which decree was dated March 4, 1929. That thereafter the Articles of Incorporation of Raleigh Oil Company were duly and regularly amended

so as to change the name of Raleigh Oil Company to McKeon Oil Company. That thereafter the above entitled action was commenced against McKeon Oil Company and such proceedings were made therein that on June 4, 1931, the above entitled court appointed George H. Stoddard, as receiver in equity of all the property and assets of said McKeon Oil Company. That on said day, said George H. Stoddard, qualified and took possession of all of the assets of McKeon Oil Company, including the realty referred to in the petition of Lewis J. Hampton herein. The Court further finds that Prudential Finance Co., a corporation, Reid & Berliner, a co-partnership, F. R. B. Drilling Co., Inc., a corporation, Reid & Campbell, a co-partnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, and each of them expressly consented to the execution of said lease.

VI.

The Court finds that each of the allegations contained in Paragraph VI of said petition are untrue except as hereinafter expressly found. The Court further finds that thereafter a like number of the divers and sundry persons who were interested in the property hereinbefore referred to executed and delivered to W. M. Pargellis a writing in words and figures the same as the copy which is attached to the Partial Stipulation of Facts filed in the above entitled matter and there marked "Exhibit F". The Court further finds that McKeon Oil Company drilled an oil well on the property hereinbefore referred to which is known as "Reiber Well No. 2", and expended therefor the sum of $220,825.42; that said well was placed upon production and from said production

said McKeon Oil Company received back to itself the cost of drilling said well and in addition thereto the sum of $19,174.58, and also paid to W. M. Pargellis the sum of $64,000.00 out of the production of said well, which moneys were from time to time distributed by said W. M. Pargellis to all of the various persons who were interested in said well. That the checks so delivered to W. M. Pargellis were drawn to "W. M. Pargellis, Trustee." The Court further finds that each of said persons received said moneys with knowledge of the fact that the same had been obtained and/or derived from the sale of oil and gas produced from said Reiber Well No. 2.

VII.

The Court finds that each of the allegations of Paragraph VII of said petition are untrue except as expressly found herein. The Court further finds that on June 4, 1931 the above entitled court appointed George H. Stoddard, as receiver in equity of all of the property and assets of said McKeon Oil Company, and that on said date, said George H. Stoddard, duly qualified and took possession of all of the assets of McKeon Oil Company, including the realty hereinbefore referred to. That at all times subsequent thereto he has been in possession thereof.

VIII.

The Court finds that all of the allegations contained in Paragraph VIII of said petition are untrue except as hereinafter expressly found. The Court further finds that the petitioner, Lewis J. Hampton, has made demand upon Respondent for the possession of said property, but that Respondent has refused to deliver the same. The Court further finds that said Respondent, George H

Stoddard, has tendered to the Petitioner, Lewis J. Hampton, all sums due under the terms of the lease under which said receiver holds said property, but that said petitioner, Lewis J. Hampton, has refused the same.

IX.

The Court finds that each of the allegations of Paragraph IX are untrue.

X.

The Court finds that each of the allegations of the Amended Answer of the respondent, George H. Stoddard, to the petition of the petitioner, Lewis J. Hampton, are true.

XI.

The Court further finds that each of the facts recited in the Partial Stipulation of Facts filed in the above entitled matter are true.

AND AS CONCLUSIONS OF LAW FROM THE FOREGOING, the court finds.

I.

That the Respondent, George H. Stoddard is lawfully entitled to the possession of the following described real properties situate in the county of Los Angeles, to wit:

"East 100 feet of Lot 24 of Blanchard's Subdivision in the Rancho Santa Gertrudes, as per map recorded in Book 18, Page 69 of Miscellaneous Records, in the Office of the County Recorder of said County.

That the Respondent George H. Stoddard is entitled to the possession of said real property as against the petitioner Lewis J. Hampton, and all persons claiming under or through him and all persons whom he represents in-

cluding W. M. Pargellis, Prudential Finance Co., a corporation, Reid & Berliner, a co-partnership, F. R. B. Drilling Co., Inc., a corporation, Reid & Campbell, a co-partnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, and each and every person claiming to be a purchaser or holder of an interest in and to any oil or gas produced from said property, by reason of the assignments hereinbefore referred to in form similar to that set forth in the Partial Stipulation of Facts filed in the above entitled matter and there marked "Exhibit C".

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 11, 1932.

Geo Cosgrave
District Judge

Approved as to form as provided in Rule 44.
Robert J Sullivan
of counsel for Petitioner.

[Endorsed]: No. U-14-C In the United States District Court In and for the Southern District of California Central Division Plymouth Oil Co., a corp. Plaintiff vs, McKeon Oil Co., a corp. Defendant. Findings of Facts and Conclusions of Law in re Petition of Lewis J. Hampton Filed Jul 14 1932 R. S. Zimmerman, Clerk By Francis E. Cross Deputy Clerk Ivan G. McDaniel Attorney at Law 642 Title Insurance Building Los Angeles, Cal. Mutual 7394 Attorneys for Defendants

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation, Defendant.	IN EQUITY NO. U-14-C
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity of McKeon Oil Company, a corporation, Respondent.	ORDER AND JUDGMENT

BE IT REMEMBERED that a hearing on the petition of Lewis J. Hampton, and the amended answer of George H. Stoddard, thereto, filed in the above entitled matter, came on regularly for hearing before the above entitled court, the Honorable George Cosgrave presiding, on

June 23, 1932, the petitioner Lewis J. Hampton being represented by Hazlett & Plummer, Esqs. by Robert J. Sullivan, Esq. and the Respondent George H. Stoddard, being represented by Ivan G. McDaniel and Spencer Austrian, Esq., and evidence both oral and documentary having been introduced, and the court being fully advised in the premises, and the court having heretofore signed and filed its written Findings of Facts and Conclusions of Law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petition of Lewis J. Hampton, filed herein be dismissed and denied, and that said petitioner take nothing by reason thereof; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Respondent George H. Stoddard, receiver in equity of the McKeon Oil Company is entitled to the possession of the following described real property situated in the County of Los Angeles, to wit:

"The east 100 feet of Lot 24 of Blanchard's Subdivision in the Rancho Santa Gertrudes, as per map recorded in Book 18, Page 69 of Miscellaneous Records, in the office of the County Recorder of said county. And that said George H. Stoddard is entitled to the possession of said realty as against the petitioner, Lewis J. Hampton, and all persons claiming under or through him

and all persons for whom he acts including W. M. Pargellis, Prudential Finance Co., a corporation, Reid & Berliner, a co-partnership, F. R. B. Drilling Co., Inc., a corporation, Reid & Campbell, a co-partnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, and all persons who have purchased or claimed to have purchased any interest in said property by reason of the assignments similar in form to those attached to the Partial Stipulation of Facts filed in the above entitled action and there marked "Exhibit C".

Dated: July 13, 1932.

Geo Cosgrave
District Judge

Approved as to form as provided in Rule 44.
Robert J Sullivan
of counsel for Petitioner

Decree entered and recorded Jul 14 1931 R. S. Zimmerman Clerk. By Francis E Cross Deputy Clerk,

[Endorsed]: No. U-14-C In the United States District Court In and for the Southern District of California Central Division Plymouth Oil Co., a corp. Plaintiff, vs. McKeon Oil Co., a corp. Defendant Order and Judgment re Petition of Lewis J. Hampton, vs. Stoddard Filed Jul 14 1932 R. S. Zimmerman, Clerk By Francis E. Cross Deputy Clerk Ivan G. McDaniel Attorney at Law 642 Title Insurance Building Los Angeles, Cal. Mutual 7394 Attorneys for Defendant

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff vs. McKEON OIL COMPANY, a corporation, Defendant.	In Equity
———	No. U-14-C
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner vs. GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	STATEMENT OF FACT FOR APPEAL

BE IT REMEMBERED that heretofore, to-wit, on the 24th day of June, 1932, the above entitled cause came on regularly for hearing at Los Angeles, California, upon the issues joined herein, before the Honorable George Cosgrave, sitting as Judge of the above entitled Court, and the petitioner herein being then and there represented by William Hazlett, Edna Covert Plummer, and Robert

J. Sullivan, Esqs., and the respondent herein having then and there been represented by Ivan McDaniel and Spencer Austrian, Esqs. The following written stipulation as to part of the facts out of which the controversy arose was entered into by and between the parties to the above entitled matter, through their respective counsel:

(Title of Court and Cause)

"IT IS HEREBY STIPULATED by and between LEWIS J. HAMPTON, Petitioner in the above matter, and GEORGE H. STODDARD, Receiver for McKeon Oil Company, through their respective attorneys of record that the following facts shall be deemed to be true at the hearing on the petition of Lewis J. Hampton.

(1) That prior to November 7, 1922, W. A. Swem, Bertha M. Swem, Roy L. Brown, Nellie Brown, Lester R. Godward, Helen P. Godward, Michael Rudolph and Lillian F. Rudolph, were the owners of and entitled to the possession of the realty described in the petition of Lewis J. Hampton. That on November 7, 1922 said persons leased said property and other property to C. H. Nickell, for the purpose of explorating for and producing oil therefrom, by written lease recorded in Book 1620, Page 176 of Official Records of Los Angeles County. That thereafter and on February 21, 1923, said C. H. Nickell assigned his interest under said lease to Theodore C. Reid and Joseph J. Berliner, which assignment was recorded March 19, 1923, in Book 2035, Page 211 of Official Records of Los Angeles County. That thereafter and on August 23, 1923, said Theodore C. Reid and Joseph J. Berliner assigned their interest under said lease to W. M. Pargellis, by an instrument in writing, a true copy of which is attached hereto and marked

Exhibit "A". That said assignment was recorded in Book 2748, Page 127 of Official Records of Los Angeles County.

(2) Contemporaneously with the assignment of said lease to W. M. Pargellis, as aforesaid Prudential Finance Co., a corporation, Reid & Berliner, a co-partnership, F. R. B. Drilling Co., Inc., a corporation, Reid & Campbell, a co-partnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, made, executed and delivered to the Citizens National Trust & Savings Bank of Los Angeles, certain written escrow instructions, a copy of which escrow instructions is attached hereto, marked Exhibit "B". That said escrow instructions were the only escrow instructions delivered to said Citizens National Trust & Savings Bank. The facts recited in this paragraph although here stipulated to be true, shall not be admitted into evidence solely by reason of this stipulation, it being expressly understood that the respondent objects and will object to the admission thereof upon the ground of materiality, competency, hearsay, etc.

(3) Thereafter the said Theodore C. Reid and Joseph J. Berliner and their respective wives, sold or caused to be sold, for valuable considerations, and to divers and sundry persons certain purported interests which were evidenced by instruments or documents which were all in form similar to the copy which is attached hereto, marked Exhibit "C".

(4) That thereafter and on or about August 11, 1928, said W. M. Pargellis caused to be signed by the various persons who were or claimed to be interested in said property, an instrument in writing, a true copy of which is attached hereto and marked Exhibit "D". That said

instruments were identical in form with the exception of the number of percents expressed therein, and were signed by the persons holding approximately ninety-four percent of the outstanding interests which were sold as aforesaid. That the persons holding the remaining 6% thereof did not sign said documents.

(5) That thereafter and on or about August 27, 1923, said W. M. Pargellis sub-leased said premises above referred to, to Plymouth Oil Company, a Nevada corporation, by a lease dated on said date and recorded on September 26, 1928, in Book 7262, Page 166 of official Records of Los Angeles County. That thereafter and from time to time supplements to said lease were entered into between W. M. Pargellis and McKeon Oil Company. That true copies of said lease and supplemental agreements are attached hereto marked Exhibit "E" and incorporated herein by reference. That a like number of persons signed written consents to the execution of said supplemental agreements as signed the consent to the original leases. That on September 11, 1928, said Plymouth Oil Company did, by an instrument in writing, assign all of its right, title and interest in and to said lease to McKeon Drilling Company, Inc., a California corporation, which assignment was recorded in Book 7264, Page 164 of Official Records of Los Angeles County. That thereafter the name of McKeon Drilling Company, Inc., was duly and regularly changed to Raleigh Oil Company by decree of the Superior Court of the State of California, in and for the County of Los Angeles, which decree was dated March 4, 1929. That thereafter the Articles of Incorporation of Raleigh Oil Company were duly and regularly amended so as to change the name of

Raleigh Oil Company to McKeon Oil Company. That thereafter the above entitled action was commenced against McKeon Oil Company and such proceedings were made therein that on June 4, 1931, the above entitled Court appointed George H. Stoddard as Receiver in Equity of all of the property and assets of said McKeon Oil Company. That on said day, said George H. Stoddard qualified and took possession of all of the assets of McKeon Oil Company, including the realty hereinbefore referred to and at all times subsequent thereto has been in possession thereof.

(6) That thereafter a like number of the divers and sundry persons who were interested in the property hereinbefore referred to executed and delivered to W. M. Pargellis a writing in words and figures the same as a copy thereof attached hereto and marked Exhibit "F". That said McKeon Oil Company drilled an oil well on the property hereinabove referred to which is known as "Reiber Well No. 2" and expended therefor the sum of $220,825.42; That said well was placed upon production and from said production said McKeon Oil Company received back to itself the cost of drilling said well and in addition thereto the sum of $19,174.58, and also paid to W. M. Pargellis the sum of $64,000.00 out of the production of said well, which moneys were from time to time distributed by said W. M. Pargellis to all of the various persons who were interested in said oil well. That the checks so delivered to W. M. Pargellis were drawn to "W. M. Pargellis, Trustee."

(7) That said persons received said moneys with knowledge of the fact that the same had been obtained

and/or derived from the sale of oil and gas produced from said Reiber Well No. 2.

(8) That on or about April 25, 1930, the said W. M. Pargellis caused a suit to be instituted in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "W. M. Pargellis, also known as Wright M. Pargellis, plaintiff, vs. McKeon Oil Company, a corporation, et al., defendants," and being case No. 301,677, in the office of the Clerk of said Court, a copy of the complaint with the exception of the account which is attached thereto as an exhibit, is attached hereto marked Exhibit "G". That thereafter said action proceeded to trial and during the course of said trial and on November 2, 1931, said Superior Court made an order, a copy of which is attached hereto marked Exhibit "H" and incorporated herein by reference. That said case is yet on trial and the trial thereof has not been concluded.

(A) That petioner has made demand upon respondent for the possession of said property but respondent has refused to deliver the same.

IT IS FURTHER STIPULATED that said facts are not all of the facts in this case and that either party shall be at liberty to introduce additional evidence at the trial of this case.

Dated this 22nd day of June, 1932.

HAZLETT & PLUMMER, and
ROBERT J. SULLIVAN,
By Robert J. Sullivan
Attorney for Petitioner, Lewis J. Hampton,
IVAN G. McDANIEL,
By Spencer Austrian
Attorney for Respondent, George H. Stoddard."

The above written stipulation as to part of the facts in this matter having been handed to the Judge presiding, the following proceedings were then had:

"MR. SULLIVAN: Your Honor, this comes before you on a petition filed by us praying for the possession of a certain oil well and an accounting for certain proceeds. We have here a stipulation of facts, or a partial stipulation as to the facts. Do you wish this read into the record?

MR. AUSTRIAN: Yes.

THE COURT: Is it very long?

MR. SULLIVAN: No. It consists of about five pages. And then annexed to it are all of the exhibits.

MR. AUSTRIAN: There is no necessity for reading it at this time. The reporter can copy it. But there is one portion of the stipulation of facts I desire to object to, that is, I have stipulated to the correctness of the facts recited therein but I object to the admission of the facts into evidence.

MR. SULLIVAN: I believe the understanding of the whole thing is, your Honor, that these are just facts that would be sworn to if the witnesses themselves were placed on the stand.

MR. AUSTRIAN: That is correct. But I wish to object to the admission into evidence of the facts recited in paragraph two of the stipulation of facts, on page 2 commencing with line 10 and ending with line 25, on the ground that the facts recited therein are incompetent, irrelevant and immaterial and are hearsay and res inter alios as to this defendant; and on the further ground that there is no proper foundation laid for the introduc-

(Testimony of Theodore C. Reid)

tion of said facts. The rest of the facts in the stipulation of facts we have no objection to.

THE COURT: Are you going to have this record written up?

MR. SULLIVAN: Your Honor, I suppose that probably we had better reserve those objections until your Honor learns what the precise question is that is objected to.

THE COURT: If I could have a record of the proceedings at this time, then I could consider the objections.

MR. AUSTRIAN: Yes. If your Honor please, I would be glad to make a statement to the court so as to give your Honor an idea of what the facts are so that you will know what the case is all about.

THE COURT: Yes. I think you had better do that."

(Mr. Austrian makes statement).

THEODORE C. REID,

called as a witness on behalf of the Respondent, being first duly sworn, testified as follows:

"THE COURT: Before you commence with Mr. Reid, do I understand that this stipulation is to be filed?

MR. AUSTRIAN: I was under the impression, your Honor, that the facts were to be read into evidence and we could make objection to the introduction of the facts, especially in paragraph 2. I have no objection to the filing of it with the understanding that we object to the facts in paragraph 2, and that the court will later rule on their admissibility.

THE COURT: Yes. I am clear on that.

(Testimony of Theodore C. Reid)

MR. SULLIVAN: And it is agreeable to us that the stipulation go in on this theory, your Honor, if I might say a word for just a moment on what the theory of the petitioner is in this matter—counsel hasn't given your Honor the real point in issue.

THE COURT: You will have an opportunity to do that later. Let's get through with this witness first.

DIRECT EXAMINATION

BY MR. AUSTRIAN:

Q You are the Theodore Reid who was interested with Mr. Berliner in an oil well down here in Santa Fe Springs?

A Yes, sir.

Q Did you execute an assignment of your interest under that lease to Mr. Pargellis?

A Yes, sir.

MR. SULLIVAN: That is objected to and I move to strike the answer on the ground it is not the best evidence of a written assignment.

THE COURT: It seems to me that objection would be good.

MR. SULLIVAN: And we object to it on the further ground it is cumulative. Those facts are already stipulated to.

THE COURT: Is the document that you are referring to in the record here?

MR. AUSTRIAN: Yes, your Honor.

THE COURT: Merely as identifying the witness that would be admissible. If he is the Mr. Reid who signed a certain instrument, that is for mere identification and that would be admissible.

(Testimony of Theodore C. Reid)

MR. SULLIVAN: That, your Honor, wasn't the way I understood the question. It was whether or not he had executed such an assignment.

THE COURT: Let's have the question, Mr. Reporter.

(Question read.)

THE COURT: It is objectionable.

Q BY MR. AUSTRIAN: Are you the person who, together with Mr. Berliner—I will withdraw that. You are the same Mr. Reid, are you not, who executed the instruments similar to Exhibit C attached to the stipulation of facts?

MR. SULLIVAN: We will stipulate that he is the same person.

MR. AUSTRIAN: Very well. And also as to Exhibit A, will you stipulate that he is the same person that signed that instrument?

MR. SULLIVAN: Yes.

Q BY MR. AUSTRIAN: After you had signed an assignment of your interest under this oil and gas lease did you know that an oil well was being drilled upon the property by Mr. Pargellis?

A Yes.

MR. SULLIVAN: That is objected to on the ground it is immaterial and cumulative.

THE COURT: Overruled. Your position might be correct but I am unable to say at this time. Overruled.

Q BY MR. AUSTRIAN: You did know that?

A Yes; I knew of it.

Q And did you also know that an oil well was being drilled by the McKeon Oil Company upon that property?

A By hearsay.

(Testimony of Theodore C. Reid)

Q Did you at any time ever object to the drilling of that oil well?

MR. SULLIVAN: That is objected to as immaterial.

THE COURT: Overruled.

A I don't recall objecting to it.

Q BY MR. AUSTRIAN: That is, it was agreeable to you?

A Well, I had assigned all of my interests and I had nothing to say about it anyway.

Q That is all.

MR. SULLIVAN: No cross-examination.

MR. AUSTRIAN: I have additional evidence but I understood we were calling this witness out of order, that is, during the argument. Do you care to proceed now?

MR. SULLIVAN: Yes; if you don't mind.

(Mr. Sullivan makes statement).

THE COURT: Are you going to call witnesses?

MR. AUSTRIAN: Yes.

THE COURT: Maybe you had better do that at this time.

MR. SULLIVAN: Mr. Austrian, is it my understanding you are going back on the stipulation now that 94 per cent of the interests did sign those authorizations?

MR. AUSTRIAN: Oh, no; I am not going back on that. They did.

MR. SULLIVAN: And that was all that signed it?

MR. AUSTRIAN: Yes. I am not going back on it. As I understand it, we stipulated that 94 per cent of the unit holders signed. Is that correct?

MR. SULLIVAN: I think we stipulated that 94 per cent of the persons holding any interests signed.

(Testimony of Joseph K. Berliner)

MR. AUSTRIAN: Now I want to show that the persons who signed this so-called trust agreement also consented in addition to the persons to whom units had been sold. I want to show that the persons who signed these escrow instructions—

THE COURT: Very well. Call your witnesses.

MR. SULLIVAN: Maybe we might be able to stipulate that the parties who signed the escrow instructions also signed consents. But the thing we are driving at is the stipulation says 94 per cent of the beneficiaries did sign those consents.

THE COURT: Consents to what?

MR. SULLIVAN: To ordering the escrow instructions to provide that the lease might be made by Pargellis. In other words, all of them did not sign it.

THE COURT: Do you accept that stipulation on that?

MR. AUSTRIAN: Yes. But I still want to prove that the persons who signed these escrow instructions consented to the drilling of the well.

THE COURT: Very well. Call you witnesses.

MR. AUSTRIAN: Mr. Berliner, take the stand.

JOSEPH K. BERLINER,

called as a witness on behalf of the Respondent, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AUSTRIAN:

Q Are you the Mr. Berliner who is associated with Mr. Reid, who was just on the stand, in the drilling of an oil well down at Santa Fe Springs?

(Testimony of Joseph K. Berliner)

MR. SULLIVAN: We will stipulate to that.

MR. AUSTRIAN: And will you also stipulate that he is the same person who assigned to Pargellis?

MR. SULLIVAN: So stipulated.

Q BY MR. AUSTRIAN: After you assigned your interest in this lease to Pargellis you knew, of course, there was an oil well in the process of drilling on the property?

A Yes.

Q And you knew that Mr. Pargellis made arrangements for the completion of the drilling of that oil well?

MR. SULLIVAN: That is objected to on the ground that the word "arrangements" is too indefinite.

MR. AUSTRIAN: I will withdraw the question.

Q You knew that Mr. Pargellis completed the drilling of that oil well?

A Are you speaking of No. 1 or No. 2?

Q No. 1.

A Yes, sir.

Q And you knew, did you not, that Mr. Pargellis—withdraw that. You knew, did you not, that the McKeon Oil Company commenced the drilling of another well on that property?

A. I heard of it.

Q And did you at any time ever make any objection to that?

A I was a disinterested party.

Q You had no interest in it whatsoever?

A No, sir.

MR. AUSTRIAN: That is all.

(Testimony of Joseph K. Berliner)

MR. SULLIVAN: No cross-examination.

MR. AUSTRIAN: Just a moment; a few more questions.

Q Do you know who the members of Reid & Berliner, a co-partnership, were?

MR. SULLIVAN: That is objected to on the ground it is not the best evidence.

THE COURT: Overruled.

Q BY MR. AUSTRIAN: Do you know who the members of Reid & Berliner, a co-partnership, were?

A Yes.

Q Who?

A Reid and Berliner, that is, myself and Mr. Reid.

Q That is, the gentleman who was just on the stand?

A Yes, sir.

Q Do you know what the F. R. B. Drilling Co., Inc. is?

MR. SULLIVAN: That is objected to on the ground it is calling for a conclusion of the witness. It is stipulated it is an incorporation.

Q BY MR. AUSTRIAN: Do you know who are the officers of the F. R. B. Drilling Co., Inc.?

MR. SULLIVAN: That is objected to on the ground it calls for the conclusion of the witness and is hearsay.

THE COURT: Overruled.

A. A man by the name of Mr. Fitch, Mr. Reid and Mr. Berliner.

THE COURT: What company is this?

A The F. R. B. Drilling Co., Inc.

MR. SULLIVAN: I move to strike the answer on the same ground, your Honor.

(Testimony of Joseph K. Berliner)

THE COURT: Strictly, the objection is good, of course, but this is to a certain extent an informal proceeding; and, if you are trying to hurry it up, this is a mighty poor way to do it.

MR. SULLIVAN: Yes; but this is cumulative of the stipulation?

THE COURT: Yes. But does the witness know about it?

A Yes.

THE COURT: Tell me who the members are of the F. R. B. Drilling Co.

Q BY MR. AUSTRIAN: As a matter of fact, you and Mr. Reid owned all of the stock in this company, is that correct?

A Yes, sir.

Q And you and Mr. Reid owned all of the stock of Reid & Berliner, Inc., did you not?

A Yes, sir.

Q And you and Mr. Reid were the Are-Bee Oil Syndicate, a trust, were you not?

A Yes, sir.

Q And Mr. Reid, who was just on the stand, is the same Mr. Reid who was a member of Reid & Campbell, a co-partnership, was he not?

A Yes, sir.

MR. AUSTRIAN: That is all.

MR. SULLIVAN: No cross-examination.

MR. AUSTRIAN: I will call Mr. Baringer.

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(Testimony of Juan J. Baringer)

JUAN J. BARINGER,

called as a witness on behalf of the Respondent, being first duly sworn, testified as follows:

Q BY THE CLERK: What is your name, please?

A Juan J. Baringer.

DIRECT EXAMINATION

BY MR. AUSTRIAN:

Q Are you an officer of the Prudential Finance Corporation, Mr. Baringer?

A I am.

Q What officer?

A Secretary.

Q How long have you been such?

A Oh, practically seven years.

Q Is Mr. Pargellis also an officer of that company?

A He is.

Q How long has he been such?

A It dates back from the time of the incorporation in September, 1923.

Q Do you know whether a board meeting was had by the directors of your company, at which time the execution of a lease on the Rieber property was discussed?

A Yes, sir.

Q Were you present at that meeting?

A I was.

Q Who else was present?

A Mr. Rittigstein and Mr. Pargellis.

Q Did that compose the board of directors?

A They were the only three members out of five who were there.

(Testimony of Lewis J. Hampton)

Q What was said at that time?

A The proposition was put up by Mr. Pargellis that he had a chance to sublease a part of that lease down there for the purpose of drilling another well; and we gave our consent for him to go ahead and do it with a reliable oil company.

MR. AUSTRIAN: That is all.

CROSS EXAMINATION

BY MR. SULLIVAN:

Q That is, just the Prudential Finance Company gave their consent?

A Just the Prudential Finance Company; yes.

MR. SULLIVAN: No further cross-examination.

MR. AUSTRIAN: I will call Mr. Hampton.

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LEWIS J. HAMPTON,

called as a witness on behalf of the Respondent, being first duly sworn, testified as follows:

Q BY THE CLERK: What is your full name?

A Lewis J. Hampton.

DIRECT EXAMINATION

BY MR. AUSTRIAN:

Q You have read over your petition in this action, have you?

A Yes; I have.

Q And you signed it and verified it?

A I have.

Q Can you tell me where you get your information that the McKeon Oil Company took this property that

(Testimony of Lewis J. Hampton)
you have alleged in your petition without the consent and contrary to the wishes, desires and permissions of Prudential Finance Company, a corporation, Reid & Berliner, F. R. B. Drilling Co., Reid & Campbell, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, or any of them?

MR. SULLIVAN: That is objected to on the ground that there is an improper attempt to impeach the witness and on the further ground that the findings of this court will govern whether or not that petition is true on the face of it or not and, furthermore, it is immaterial where he got his information.

THE COURT: Overruled.

A On these assignments.

Q BY MR. SULLIVAN: On what assignments?

A The fact they didn't all sign; the fact they didn't all consent.

MR. SULLIVAN: May we note an exception to the court's ruling?

THE COURT: Yes.

Q BY MR. AUSTRIAN: Do you know who the officers of the F. R. B. Drilling Co., Inc. are?

A No; I do not.

Q How do you know they didn't consent?

A I am not speaking of the officers. I am speaking of the unit holders.

Q Is the F. R. B. Company, Inc. a unit holder?

MR. SULLIVAN: That is objected to as argumentative.

THE COURT: Overruled.

(Testimony of Lewis J. Hampton)

A. Not in this receivership estate I am representing, they are not.

Q BY MR. AUSTRIAN: As a matter of fact, you don't know whether the F. R. B. Drilling Co. Inc. ever consented or not, is that correct?

A No; I do not.

Q And you don't know whether the Prudential Finance Company, a corporation, consented or not?

A No; I do not.

THE COURT: Unless you expect to develop something other than lack of knowledge of these matters in the complaint, I don't think it is important. It is for the petitioner to establish its truth.

MR. AUSTRIAN: Very well. That is all.

MR. SULLIVAN: That is our contention, your Honor, where he gets his information. And we move now to strike the whole examination from the record based on the same grounds as heretofore given.

THE COURT: No, I will let it stand.

MR. SULLIVAN: We will note an exception.

CROSS EXAMINATION

BY MR. SULLIVAN:

Q When you said, Mr. Hampton, that you do not know whether or not these people signed consents, what do you mean by that?

A Several of them had been in my office, saying they didn't consent to it.

Q And have you any written consents on file in your office for those people?

A No.

(Testimony of Lewis J. Hampton)

MR. SULLIVAN: That is all.

MR. AUSTRIAN: That is all. That is all we have.

MR. SULLIVAN: Nothing further on behalf of the petitioner. We rest.

THE COURT: Very well, gentlemen. Do you want to file anything in the way of authorities or do you want to argue the matter?

MR. AUSTRIAN: I think the matter should be argued, your Honor. I think oral argument would be the best way to handle it.

THE COURT: It will be necessary for me to familiarize myself with the record before you do that and I will be glad to give you an opportunity any time that I can.

MR. AUSTRIAN: Is your Honor going to rule at this time on the question of the admissibility of the facts in the stipulation to which objections were made?

THE COURT: No. I couldn't very well do that.

MR. AUSTRIAN: Will you reserve a ruling on that?

THE COURT: I will reserve a ruling on that.

MR. AUSTRIAN: Does your Honor desire to fix a time for oral argument on this matter?

THE COURT: It wouldn't be possible now but I will probably be able to reach it next week. Will you be able to attend to it on short notice?

MR. AUSTRIAN: I believe so.

MR. SULLIVAN: Yes, your Honor. And I wonder if before we close this matter—there was one item left

out of the stipulation and that is that you have impounded in the hands of Mr. Stoddard, the Receiver, at the present time a little in excess of $7,000.

MR. AUSTRIAN: Which we have offered to pay you.

MR. SULLIVAN: Other than as mentioned in the stipulation of fact on file.

MR. AUSTRIAN: Yes. We will so stipulate on the condition that you stipulate that we have offered to pay it to you and you refused to accept it.

MR. SULLIVAN: Yes; that is all right. We will stipulate to that.

MR. AUSTRIAN: That amount of money, of course, represents the amount of money due as rental under the sublease.

THE COURT: Due to whom?

MR. AUSTRIAN: Due to W. M. Pargellis or, if Mr. Hampton is in fact the receiver, then it is due to him, of which we have made tender.

MR. SULLIVAN: And that no money at all has passed between Mr. Stoddard and Mr. Hampton on those leases?

MR. AUSTRIAN: I think that is the fact, although we have tendered it to him.

THE COURT: Very well, I will notify counsel as soon as I can reach it. We will take a recess until 2 o'clock."

EXHIBITS

That the following exhibits are those stipulated to and offered and used by both parties in this proceeding, and which are annexed to the written stipulation of part of the facts out of which this controversy arose:

STIPULATED EXHIBIT A, BOTH PARTIES ASSIGNMENT OF LEASE

"BOOK 2748 PAGE 127 OF OFFICIAL RECORDS.
ASSIGNMENT OF LEASE

This assignment made and entered into this 23rd day of August, 1923, by and between Theodore J. Reid and Genevieve V. Reid, his wife, Joseph J. Berliner and Mabel E. Berliner, his wife, parties of the first part, of the City of Los Angeles, County of Los Angeles, State of California, and W. M. Pargellis, Trustee, of the same place, party of the second part;

Witnesseth: That Whereas, the said first parties have secured an assignment of that certain lease dated November 7th, 1922, by and between C. H. Nickell, as leasee, and W. A. Swem and Bertha M. Swem, his wife, Roy L. Brown and Nellie Brown, his wife, Lester R. Godward and Helen Godward, his wife, and Michael Rudolph and Lillian F. Rudolph, his wife, as lessors, said assignment being described as follows:

Lots Twenty-two (22) and Twenty-four (24) of Blanchard Subdivision in the County of Los Angeles, State of California, as per maps recorded in Book 18 at Page 69 Miscellaneous Records in the office of the County Recorder of said County.

Now, Therefore, in consideration of the sum of One ($1.00) Dollar and other valuable considerations by said

party of the second part herein to said parties of the first part hereto in hand paid, receipt whereof is hereby acknowledged, said first parties hereby sell, transfer and set over to said second party hereto all of their right, title and interest in and to the aforementioned leasehold estate hereinbefore described.

This assignment shall be binding upon and inure to the benefit of the heirs, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

Theo. C. Reid
Genevieve V. Reid
Joseph J. Berliner
Mabel E. Berliner

State of California,)
) SS.
County of Los Angeles)

On this 25th day of August in the year nineteen hundred and 23 A. D. before me, Louisa J. Mullaney, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Theo. O. Reid, Genevieve V. Reid, Mabel E. Berliner, Joseph J. Berliner, personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notarial Seal) Louisa J. Mullaney,
Notary Public in and for Los Angeles County, State of California. My Commision expires April 3, 1927.

#1331. Copy of original recorded at request of Assignee, Aug. 29, 1923 at 19 Min. Past 12 M. Copyist #3 Compared, C. L. Logan, County Recorder, By M. Frazier, Deputy.

. . . . . .

STATE OF CALIFORNIA)
) SS.
County of Los Angeles)

I hereby certify the foregoing to be a full, true and correct copy of the instrument appearing recorded in Book No. 2748 of Official Records, Page 127, Records of Los Angeles County, and that I have carefully compared the same with the original record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, this 26 day of November, 1929.

(Seal) C. L. LOGAN, County Recorder
By B. M. SANFORD, Deputy

STIPULATED EXHIBIT B, BOTH PARTIES
ESCROW INSTRUCTIONS

"EXHIBIT 'A'

Escrow 14802
Sept. 18, 1923.

Citizens Trust and Savings Bank,
City.
Gentlemen:—

We, Reid & Berliner, F. R. B. Drilling Co. Inc., Reid & Campbell, Are-Bee Oil Syndicate and Reid & Berliner, Inc. will hand you the following papers affecting NE¼

of the SE¼ Section 1, Township 3 South, Range 12 West, known as the "Mac Well" and Lots 22 and 24 Blanchard Subdivision at 18/69 M. R. known as the "Reiber Well" namely:

1st: Assignment of lease dated November 7th, 1922 between C. H. Nickell and W. A. Swem, et al., same to show properly assigned by us to W. M. Pargellis, Trustee.

2nd; Drilling contracts on Reiber Well—assigned to W. M. Pargellis, trustee.

3rd: Assignment of 18 9/20% interest in Reiber Well to W. M. Pargellis, trustee.

4th: Assignment of 30% interest in the Mac Well to W. M. Pargellis, trustee,

which you are authorized to hold in escrow under the following conditions:

You will receive $40,000.00 more or less from 60% of the first production of the Reiber Well; that proportion of the production to 18 9/20% above assigned, that proportion accruing to the 30% of the Mac Well, above assigned, and any funds which may be received from the sale of any equipment now held under chattel mortgage securing a certain $35,000 note in favor of Citizens Trust and Savings Bank.

You will pay out this money on the order of W. M. Pargellis, trustee for the following purposes:

AND IT IS HEREBY AGREED Between the principals hereto that the money shall be used for the following purposes, towit:

1st: To the expense of operating the Reiber Well.

2nd: The cost of drilling operation on the Reiber Well.

3rd: The payment of a $35,000.00 note to the Citizens Trust and Savings Bank dated 8/22/23 due 90 days thereafter.

4th: "A" $35,000.00 due in accordance with previous agreement with Prudential Finance Company in a previous escrow with Citizens Trust and Savings Bank.

"B" $30,000.00 more or less due to supply houses by the F. R. B. Drilling Corporation or affiliated interests.

5th: $70,000.00 more or less due to Are-Bee Oil Syndicate, a trust, being an impounding fund under escrow No. with Citizens Trust and Savings Bank, same to be held under instructions in said escrow.

Each order drawn for payment of money as above to be signed by the Trustee and such order to state what the payment applied. The bank as escrow agent is hereby relieved of all responsibility as to the application of the funds so drawn and is not liable to any party hereto for the proper application of said funds.

W. M. Pargellis, as trustee, shall release by assignment 1% or more of the Mac Well, same not to exceed 20% on a basis of $2500.00 for each 1% providing the money so received is placed in escrow to the credit of said trustee, and provided further, that should the entire 30% of the Mac Well be sold the trustee shall assign same on a payment of $55,000.00 to be used under above trusts.

W. M. Pargellis, trustee, shall immediately place in escrow a reassignment of the assignments aforemade to him, except those in the Mac Well, which are to be delivered only when the above conditions have been fulfilled in the following manner:

1st: 13 9/20% of Reiber Well to be assigned to Reid & Berliner.

2nd: 5% of Reiber Well to be assigned to Prudential Finance Company.

All expenses of this escrow to be paid out of the funds accruing therein.

It is hereby understood that you are not to make an examination of the property herein described nor to the title thereof nor any instrument deposited in this escrow but are to make a delivery of said instruments as in escrow at the proper time without any further liability to yourselves.

In case no part of the 30% under the Mac Lease is sold doing this escrow and providing all other conditions are fulfilled as above you are to procure from the trustee an assignment of said 30% to Reid & Campbell.

These instructions are not limited as to the time and are irrevocable except by the written consent of all parties to this escrow.

W. M. PARGELLIS,
Trustee.

PRUDENTIAL FINANCE CO.
By John T. Roundtree, Pres.
By Geo. E. Reid, Secty. & Treas.

REID & BERLINER, a co-partnership
Theodore C. Reid Genevieve V. Reid, by Theodore C. Reid
Joseph J. Berliner, Mabel E. Berliner, by Joseph J. Berliner, Atty in fact.

F. R. B. DRILLING CO. INC.
Theodore C. Reid, Pres. & Treas.
Joseph J. Berliner, Vice-Pres., Secy.

REID & CAMPBELL, a co-partnership
Theodore C. Reid, Genevieve V. Reid by Theodore C. Reid, Atty in fact.
M. A. Campbell, Nellie L. Campbell By M. A. Campbell, Atty in fact.

ARE-BEE OIL SYNDICATE, a trust,
Julian G. Kirsten
Theodore C. Reid,
Joseph J. Berliner
M. A. Campbell

REID & BERLINER INC
Theodore C. Reid, Pres. & Treas.
J. G. Kirsten, Secy.

STIPULATED EXHIBIT C, BOTH PARTIES, FORM OF ASSIGNMENT OF INTERESTS.

"This agreement, made and entered into this..... day of..... 1923, by and between Theodore C. Reid and Genevieve V. Reid, his wife, and Joseph J. Berliner and Mabel E. Berliner, his wife, all of the City of Los Angeles, California, parties of the first part, and ....., party of the second part. Witnesseth: That for and in consideration of the sum of $10.00 and other good and valuable considerations to the parties of the first part in hand paid, the receipt whereof is hereby acknowledged, the parties of the first part do hereby sell, assign, transfer and convey unto the party of the second part and to his heirs and assigns and undivided ..... per cent Royalty Interest in and to all oil and gas produced from that certain land located in the Santa Fe Springs Oil District in the County of Los Angeles, State of California more particularly described as: Lot 22 and 24 of Blanchard's Subdivision as per maps thereof recorded in Book 18 page 69, Miscellaneous Record, in the office of the County Recorder of Los Angeles County, which land is held by the parties of the first part under an assignment of lease recorded in said office on the 6th day of December, 1922, in Book 1620, Page 176 of Official Records, and said party of the second part hereby purchases said Royalty Interest on the following terms and conditions, to wit: It is mutually understood and agreed that said Royalty Interest is subject to its proportionate share of the cost in excess of $110,000.00 and not exceeding $150,000.00 of drilling a well on said lease, which cost is payable out of oil. The parties of the first

part are hereby expressly authorized and empowered to sell all oil and gas produced from said lease and to receive the proceeds thereof and agree to remit to the party of the second part each month for his said part of said oil and gas produced and sold during the preceeding month, less however, the cost of operating the well or wells on said lease, which cost it is hereby understood and agreed shall be pro rated among the holders of an undivided 60% Royalty Interest in all of the oil produced from said lease. In witness whereof, we have hereunto set our hands and seals the day and year first hereinabove written

Theodore C. Reid
Genevieve V. Reid
by Attorney in Fact

Joseph J. Berliner
Mabel E. Berliner
By Joseph J. Berliner
Attorney in fact

Parties of the first part

.....

Party of the second part

STIPULATED EXHIBIT D, BOTH PARTIES, FORM OF AUTHORIZATION FOR AGREEMENT TO DRILL WELL

"Los Angeles, California,
August 11, 1928.

Mr. W. M. Pargellis, Trustee,
Los Angeles, California.
Dear Sir:

In consideration of the agreement to be made by you as Trustee with an Oil Company, in your opinion re-

sponsible, said Company to drill a second well on the following described property in Los Angeles County, State of California:

Lots 22 and 24 of Blanchard's Sub-division in the County of Los Angeles, State of California, as per map recorded in Book 18, page 69 Miscellaneous Records Los Angeles County California:

and so that a satisfactory lease may be made with said Company, and in further consideration of a like promise being made by others interested in said land, I hereby agree to the following:

That out of the first oil and gas saved and produced from said well, the Company drilling said well is to have and receive out of 7/8ths of the gross production the cost of said drilling, not to exceed $125,000.00, with the further understanding that there is to be no charge or cost to us in connection with said drilling. That until said Oil Company has been reimbursed for the drilling of said well as above stated, I am to share in 1/8th of the gross production from said well on the following basis: (the following percentage was inserted with pen)

~~1/4 of +% of Net total received by Trustee.~~

That after said Company has received the cost of drilling said well as aforesaid, I am then to have and receive the same proportion of 40% of Rieber #2 as I am now receiving in 100% of Rieber #1 it being expressly understood and agreed that my royalty interest in the well known as Rieber No. 1 remains unchanged.

Very truly yours,

(Signed) ~~C. J. Curtis~~

Accepted:

(Signed) W. M. Pargellis

Trustee

STIPULATED EXHIBIT E, BOTH PARTIES
OIL AND GAS LEASE.

"*OIL AND GAS LEASE*

THIS LEASE MADE AND ENTERED INTO this 27th day of August, 1928, by and between W. M. Pargellis, Trustee, of Los Angeles, California, first party, hereinafter called Lessor, and PLYMOUTH OIL COMPANY, a Nevada Corporation, second *part,* hereinafter called Lessee,

WITNESSETH:

That the Lessor, for and in consideration of Ten Dollars in hand paid, receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the Lessee to be paid, kept and performed, has granted, demised, leased and let, and by these presents does grant, demise, lease and let to said Lessee, for the purpose of exploring, mining and operating for oil, gas and casinghead gas, and other hydrocarbon substances, and taking, storing, removing and disposing of same, and manufacturing gasoline and other products therefrom, with the right for such purposes, to the free use of oil, gas or water from said land, but not from Lessor's wells, and granting the right to build tanks and such other structures (excepting refinery) as may be necessary and convenient in its operations, together with rights-of-way and servitude for pipe lines, power lines, telephone and telegraph lines, with the right of removing either during or after the term hereof any and all improvements placed or erected on the premises by Lessee, including all casing, all that certain tract of land situated in the County of Los Angeles, State of California, described as follows, to-wit:

East 100 feet of Lot 24 of Blanchard's Subdivision in the Rancho Santa Gertrudes, County of Los Angeles, State of California, as per map recorded in Book 18, Page 69 of Miscellaneous Records in the office of the County

together with the right to put tanks on Lot 22 of said Tract, providing said tanks are placed so as not to interfere with any drilling operations now being carried on on said tract, subject to the terms and conditions of an Oil Contract dated May 1st, 1927, between Lessor and Rio Grande Oil Company, a corporation, said contract terminating April 30, 1932.

TO HAVE AND TO HOLD, the same for a term of twenty (20) years from and after the date hereof, and so long thereafter as oil or gas or casinghead gas or other hydrocarbon substances, or either of any of them, is produced therefrom in quantities deemed paying by Lessee.

In consideration of the premises it is hereby agreed as follows:

1. That on or before thirty (30) days from and after the delivery of this lease the Lessee will have erected a good and sufficient derrick on said described premises sufficient for the drilling operations required hereunder, and on or before forty-five (45) days from and after the delivery of this lease the Lessee will be actually engaged in the drilling of an oil well on said premises, and thereafter prosecuting the drilling of said well with reasonable diligence and in good faith to a depth of Sixty-two Hundred (6200) feet, unless oil is found in paying quantities as hereinafter defined, at a lesser depth. It is understood that the said oil well will be drilled with a rotary or standard outfit in the manner customary and

usual in the Santa Fe Springs Oil District, and that no portable or other temporary outfit or apparatus shall be used on said premises.

2. That said Lessee will continuously pump and operate any well in which it shall obtain oil or gas, and will prosecute the work herein specified diligently and in good faith.

3. That said Lessee shall pay Lessor, as royalty one-eighth (⅛th) of the proceeds derived from the sale of gas from said premises, as well as one-eighth (⅛th) of the proceeds of the gasoline or other products manufactured and sold by the Lessee from gas products from said well until the Lessee has been reimbursed for the cost of drilling said well, which said cost shall in no event exceed the sum of One Hundred Twenty-five Thousand ($125,000.00) Dollars. After said Lessee has been so reimbursed from production of oil or gas for the drilling of said well, it shall pay said Lessor as royalty or rental forty per cent (40%) of the proceeds of all oil removed from said premises, together with forty per cent (40%) of the proceeds derived from the sale of gas from said premises, as well as forty per cent (40%) of the proceeds of gasoline or other products manufactured and sold by the Lessee from gas produced from said well.

4. That said Lessee will market all royalty oil and gas along with and upon the same terms that it markets its own, and cause the purchaser of said oil and gas to pay same to the said Lessor on the basis above provided on the ..... day of each and every month, after deducting therefrom Lessor's pro rata of operating cost based upon the proportionate interest as above stated, without any other expenses to said Lessor. If any gas is sold,

then the Lessee shall pay to the Lessor his percentage thereof, as above agreed, on the 20th day of each and every month. If casinghead gasoline is manufactured on the premises or elsewhere by the Lessee from gas produced in said well, then the Lessee shall pay to the Lessor his percentage thereof as above agreed, less the pro rata percentage to the Lessor of the cost of producing and selling the same, which payment shall be made monthly.

5. If, after the expiration of the twenty year term of this lease, production on the premises herein leased shall cease from any cause, this lease shall not terminate provided Lessee resumes operations for the restoration of production within sixty (60) days from such cessation, and this lease shall remain in force during the prosecution of such operation, and, if producion results therefrom, then as long as production continues.

6. Notwithstanding anything in this lease contained to the contrary, it is expressly understood and agreed that the obligation imposed upon the Lessee may be suspended so long as Lessee's compliance is prevented by the elements, accidents, strikes, lockouts, riots, delays in transportation, inability to secure materials in the open market or interference by State or Federal action, or other causes beyond the reasonable control of the Lessee.

7. The Lessee shall carry on all operations in a careful, workmanlike manner and in accordance with the laws of the State of California. The Lessee shall keep full records of the operations and of the production and sales of products from said property and such records and the operations on the property shall be at all reasonable times open to the inspection of the Lessor. Whenever requested by the Lessor, the Lessee shall furnish to the

Lessor a copy of the Log of the well drilled on said property, and Lessee shall furnish to the Lessor copies of all reports filed with the Mining Bureau of the State of California.

8. That the Lessee shall pay all taxes on his improvements and seven eight's (7/8ths) of the increase if the taxes resulting from the production of oil on said premises, and taxes on all oil belonging to the Lessee stored on said land until Lessee has been reimbursed for the cost of drilling said well as hereinabove provided; thereafter said Lessee shall pay sixty per cent (60%) of such taxes and the Lessor shall pay the remaining forty per cent (40%) of such taxes. The Lessee is hereby authorized to pay all taxes on said land and improvements and deduct the Lessor's share from the amount of royalties due Lessor.

9. On the expiration of the lease, or if sooner terminated, the Lessee shall quit and peaceably surrender possession of the premises to the Lessor, and deliver to him a good and sufficient quit claim deed, and shall, so far as practicable, cover all sump holes and excavations made by it. In case of abandonment of said well by Lessee, if the Lessor desires to retain the same, he may notify the Lessee to that effect, and thereupon the Lessee shall leave such casing in the well as the Lessor may require, and the Lessor shall pay to the Lessee fifty (50) per cent of the original cost of such casing on the ground.

10. All work done on the land by the Lessee shall be at the Lessee's sole cost and expense, and the Lessee agrees to protect said land and the Lessor of claims of contractors, laborers or material, men, and the Lessor may post and keep posted on said lands such notices as

he may desire in order to protect said lands against liens.

11. Lessor hereby warrants and agree*d* to defend the title to the land herein described and agrees that the Lessee, at its option, may pay and discharge any taxes, mortgages or other valid liens existing, levied or assessed on or against the above described lands, and in the event it exercises such option, it shall be subrogated to the rights of any holder or holders thereof and may reimburse itself by applying to the discharge of any such mortgage, taxes or other valid lien, any royalty or rentals accruing hereunder.

12. If the estate of either party hereto is assigned, and the privilege of assigning is expressly allowed, the covenants hereof shall extend to the heirs, executors, administrators, successors and assigns, but no change of ownership in the land or in the rentals or royalties shall be binding on the Lessee until after Lessee has been furnished with written notice of such transfer or assignment, together with a certified copy of the instrument of transfer or assignment.

13. "Drilling Operations" as used in this lease is defined to mean placing of material upon premises for the construction of a derrick and other necessary structures for the drilling of an oil and gas well followed diligently by the construction of such derrick and other structures, and by the actual operation of drilling in the ground.

14. All payments which may fall due under this lease shall be made to W. M. Pargellis, Trustee, in the manner herein stated.

15. "Paying Quantities" as used in this lease shall mean not less than one hundred barrels of oil produced daily from said well for thirty (30) consecutive days.

IT IS UNDERSTOOD that W. M. Pargellis, trustee, acquired his rights through a lease dated November 7th, 1922, executed by W. A. Swem, Bertha M. Swen, his wife, Roy L. Brown, Nellie Brown, his wife, Lester R. Godward, Helen P. Godward, his wife, Michael Rudolph and Lillian F. Rudolph, his wife to C. H. Nickell, recorded in Book 1620, Page 176 of Official Records, Los Angeles County, California; the interest of said C. N. Nickell being assigned to Theodore C. Reid and Joseph J. Berliner, by assignment dated February 21st, 1923, and recorded March 29th 1923, in Book 2035, Page 211 of Official Records, Los Angeles County, California, followed by an Assignment by Theodore C. Reid and Joseph J. Berliner of said lease to W. M. Pargellis, Trustee, by Assignment dated August 23rd, 1923, and recorded in Book 2748, Page 127 of Official Records, Los Angeles County, California.

Time is the essence of this agreement.

IN WITNESS WHEREOF, the parties hereto have caused this lease to be executed the day and year first above written.

W. M. PARGELLIS
Lessor.

PLYMOUTH OIL COMPANY,
a Nevada corporation
By PAUL F. TRAVIS
President.
By RAY T. MOORE
Secretary.
Lessee

State of California,)
) ss.
County of Los Angeles.)

On this 28th day of August, in the year nineteen hundred and 28, A. D., before me, F. Ione Russell, a Notary Public in and for the said County of Los Angeles, State of California residing therein, duly commissioned and sworn, personally appeared W. M. Pargellis personally known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

SEAL F. IONE RUSSELL
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 26, 1931.

State of California)
) ss.
County of Los Angeles)

On this 27th day of August, in the year nineteen hundred and twenty-eight, A. D., before me, MARGUERITE G. BURROWS, a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Paul F. Travis, known to me to be the President, and Ray T. Moore, known to me to be the Secretary of Plymouth Oil Company, the Corporation that executed the within instrument known to me to be the Persons who executed the within instrument on behalf of the Corporation therein named, and acknowledge to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

MARGUERITE G. BURROWS,
Notary Public in and for Los Angeles County, State of California.

My Commission expires, July 7, 1929.

SUPPLEMENTAL AGREEMENT TO OIL AND GAS LEASE

—oo—

AGREEMENT, made the 12th day of September, 1923, by and between W. M. Pargellis, Trustee, party of the first part, and McKEON DRILLING COMPANY, INC., a California Corporation, party of the second part,

WITNESSETH:

WHEREAS party of the first part, as lessor, has heretofore, and as of August 27, 1928, made and delivered an oil and gas lease of the premises hereinafter described to Plymouth Oil Company, as Lessee, and

WHEREAS said Plymouth Oil Company has assigned said oil and gas lease to the party of the second part, and

WHEREAS, the parties hereto desire to amend the said lease in certain particulars, hereinafter set forth, and to cure certain ambiguities in said lease,

NOW, THEREFORE IN CONSIDERATION OF THE PREMISES AND OF THE MUTUAL COVENANTS HEREIN CONTAINED THE PARTIES AGREE AS FOLLOWS, To WIT:

1. The party of the first part, consents to the assignment, by said Plymouth Oil Company, to the party of the second part, of that certain oil and gas lease affecting the premises particularly described as, East One Hundred (100) feet of Lot Twenty-four (24) of Blanchard's Subdivision in the Rancho Santa Gertrudes, County of Los Angeles, State of California, as per map recorded in Book 18, Page 69 of Miscellaneous Records in the office of the County Recorder of said County, made by the party of the first part as Lessor to said Plymouth Oil Company, as Lessee and bearing date the 27th day of August, 1928.

2. ~~It is mutually understood and agreed that the period of time within which the lessee shall have erected a derrick, and shall have actually commenced the drilling of an oil well, as in paragraph "1" of said lease mentioned shall commence to run from the date of this agreement, and not from the date of said lease.~~

[ok to strike out. W. P.]

3. It is further mutually understood and agreed that the drilling requirements/of said lease, as set forth in paragraph "1" thereof shall be construed to mean that lessee shall drill the well therein mentioned, to a depth of sixty two hundred (6200) feet, unless the zone of oil sand known as the "Buckbee sand" is successfully penetrated, and oil or gas produced therefrom at a lesser depth, provided, however, that in any event said well shall not be placed on production from the zone from which the existing well on the said premises is now producing; it being the purpose and intent of said lease that all production thereunder shall be from the deeper zone, generally known as the "Buckbee sand" underlying the presently producing zone.

4. It is further understood and agreed that the cost of drilling said well, for the purpose of reimbursing the Lessee for such drilling, as set forth in paragraph "3" of said lease is hereby fixed at the sum of One Hundred Twenty Five Thousand ($125,000) Dollars, regardless of the sum the party of the second part may actually expend thereon.

5. It is further understood and agreed that the Lessee shall have the right to enter into a new purchase contract for the sale of oil from the premises so leased, upon the termination of the existing contract with the Rio Grande Oil Company, mentioned in said lease, provided that the price paid under such purchase contract shall never be less than the posted price, and that the lessor shall receive the benefit thereunder of any bonus, over the posted price, which may be offered for oil from said premises.

6. And the party of the first part covenants and agrees that if at any time he decides to deepen the well, known as the Rieber #1, now/producing on said premises, the party of the second part shall have the first and prior right to deepen said well, on terms not less favorable to the party of the second part, then are offered to any other responsible contractor.

7. It is mutually understood and agreed that wherever the terms and conditions of the said lease and of this agreement conflict, the terms and conditions of this agreement shall supercede and control the terms and conditions of said lease; in all other respects the terms and conditions of said lease are hereby adopted, accepted and confirmed, as the agreement of the parties hereto.

IN WITNESS WHEREOF the party of the first part has hereunto set his hand and the party of the second part has executed this agreement by its proper officers, thereunto duly authorized, the day and year first above written.

W. M. Pargellis, Trustee
Party of the first part, as lessor.

MC KEON DRILLING CO., INC.,
(SEAL) By R. S. McKeon
Its President

By E. A. Th*ak*aberry
Its Secretary

Attest:

E. A. Thackaberry
Secretary.
Party of the second part, as lessee.

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES.)

On this 12th day of September, A. D. 1928, before me, H. L. Watt a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared W. M. Pargellis, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

H. L. Watt
Notary Public in and for said County and State.

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES.)

On this 12th day of September, A. D. 1928, before me, Marguerite G. Burrows, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared R. S. McKeon, known to me to be the President and E. A. Thackaberry, known to me to be the Secretary of the MC KEON DRILLING CO., Inc., the corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) Marguerite G. Burrows,
Notary Public in and for said County and State.

SECOND SUPPLEMENTAL AGREEMENT TO OIL AND GAS LEASE

THIS AGREEMENT, made this 10th day of April, 1929, between W. M. Pargellis, Trustee, party of the first part, and Raleigh Oil Company, a California corporation, formerly known as McKeon Drilling Company, Inc., which name was changed by Decree of the Superior Court in and for the County of Los Angeles, State of California, dated March 4th, 1929, party of the second part.

WITNESSETH:

WHEREAS, on the 27th day of August, 1928, a certain oil and gas lease was made and entered into between W. M. Pargellis, Trustee, of Los Angeles, California, Lessor and Plymouth Oil Company, a Nevada Corporation, Lessee, covering the following described land in the County of Los Angeles and State of California, to wit:

East 100 feet of Lot 24 of Blanchard's Subdivision in the Rancho Santa Gertrudes, County of Los Angeles, State of California, as per map recorded in Book 18, Page 69 of Miscellaneous Records in the office of the County Recorder of said County;

said lease being recorded in the office of the County Recorder of Los Angeles County, in Book 7262 at Page 166 of Official Records, Los Angeles County, California.

WHEREAS, on the 11th day of September, 1928 said Plymouth Oil Company, a corporation did make and deliver an assignment of said oil and gas lease unto McKeon Drilling Company, Inc., as assignee, which said assignment was received and accepted by said McKeon Drilling Company, Inc., and recorded in the office of the County Recorder of Los Angeles County, in Book 7262 at Page 164 of Official Records, Los Angeles County, California.

WHEREAS, on the 12th day of September, 1928, a certain supplemental agreement was made and entered into between said W. M. Pargellis, Trustee, as Lessor and McKeon Drilling Company, Inc., as Lessee, said agreement being recorded in Book 7295 at Page 156 of Official Records, Los Angeles County.

WHEREAS, under and by the terms of said Lease as modified by said supplemental agreement McKeon Drilling Company, Inc., did drill a well upon the said premises

and secured production of oil and gas from the zone of oil sand known as the "Buckbee" said, which well, known

[ok W. M. P. E. A. T.] 2

and described as the Reiber No. +, has been producing from said sand at a depth of 5765 feet, from which production McKeon Drilling Company, Inc., was to receive and is receiving 87½ per cent, which is being applied and credited upon the sum of One Hundred Twenty Five Thousand Dollars ($125,000.00) to be paid unto said McKeon Drilling Company, Inc., which said sum has not been and is to be wholly paid from the oil and gas produced from said property, all as provided in said Supplemental agreement.

WHEREAS, said well has gradually decreased in production and has now ceased to produce and is entirely off production and oil and gas in large volume have been discovered in the area embracing said property from the zone of oil sand known as the "O'Connell Sand" and wells are being drilled on property adjoining the property described herein which will drain the oil and gas from beneath said property, and it is, therefore, necessary to

[ok W. M. P. E. A. T.] 2

deepen said well Reiber No. + to said deeper zone of oil sand known as the "O'Connell Sand",

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES AND OF THE MUTUAL COVENANTS AND AGREEMENTS HEREIN CONTAINED, THE PARTIES HERETO DO HEREBY AMEND SAID LEASE AND SUPPLEMENTAL AGREEMENT AS FOLLOWS, AND TO-WIT:

A. It is mutually agreed and understood that the drilling requirements of said lease as modified by said

Supplemental agreement shall be construed to mean that the party of the second part shall at once deepen said

2 [ok W. M. P.]

well Reiber No. ÷ to a depth of 6700 feet unless the zone of oil sand known as the "O'Connell Sand" is successfully penetrated and oil and gas in paying quantities produced therefrom at a lesser depth.

B. It being specifically agreed and understood that the balance unpaid on the sum of One Hundred Twenty-five Thousand Dollars, ($125,000.00) as agreed in the Supplemental Agreement dated September 12th, 1928 is first to be paid from said property and that in addition thereto, it is understood and agreed that the cost of deepening said well, as herein provided, to the "O'Connell zone," for the purpose of reimbursing the Lessee for such deepening or drilling, as set forth in Paragraph "3" of said lease is hereby fixed at the sum of Thirty Thousand Dollars ($30,000.00), regardless of the sum the party of the second part may actually expend.

It being the express agreement that the party of the second part is to collect and receive 87½ per cent of all production until the said sum of One Hundred Twenty-Five Thousand Dollars. ($125,000.00) plus Thirty Thousand Dollars ($30,000.00) or a total of One Hundred Fifty Five Thousand Dollars ($155,000.00) is wholly paid and that thereafter said party of the second part is to receive sixty per cent (60%) of all oil and gas produced and saved from said premises.

C. It is further agreed, that if the said party of the second part shall diligently try and shall fail to bring in a producing well in paying quantities at the greater depth, as hereinbefore provided, due to mechanical or to any

reason, then and in that event, the said party of the second part shall be absolved from all damages, liabilities and drilling commitments and shall not be required to further drill said premises and the lease may cease and determine at the option of the party of the second part, and the said party of the second part may quitclaim the said property to the party of the first part, his successors or assigns, and thereupon all rights and obligations of the parties hereto, one to the other, shall cease and determine.

D. It is mutually understood and agreed that wherever the terms and conditions of the said lease, as modified by said Supplemental Agreement, dated the 12th day of/September, 1928, and of this agreement conflict, the terms and conditions of this Second Supplemental Agreement shall supersede and control the terms and conditions thereof; in all other respects the terms and conditions of said lease, as modified by said Supplemental agreement, are hereby adopted, accepted and confirmed as the Agreement of the parties hereto.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and the party of the second part has executed this Agreement by its proper officers, thereunto duly authorized, the day and year first above written.

W. M. PARGELLIS, Trustee
Party of the First Part as Lessor.

RALEIGH OIL COMPANY
By R. B. McKEON
Its President
By E. A. THACKABERRY
(SEAL) Its Secretary
Party of the Second Part as Lessee

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On this 10th day of April, 1929, before me, Irvin C. Louis, a Notary Public in and for the said County and State, personally appeared W. M. PARGELLIS known to me to be the person who executed the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) Irvin C. Louis
NOTARY PUBLIC in and for the County of Los Angeles, State of California.

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On this 10th day of April, 1929, before me, Marguerite G. Burrows, a Notary Public in and for the said County and State, personally appeared R. B. McKEON known to me to be the President, and E. A. THACKABERRY, known to me to be the Secretary of RALEIGH OIL COMPANY, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) Marguerite G. Burrows,
NOTARY PUBLIC in and for the County of Los Angeles, State of California

THIRD SUPPLEMENTAL AGREEMENT TO OIL AND GAS LEASE

THIS AGREEMENT, made this 15th day of July, 1929, between W. M. PARGELLIS, Trustee, party of the first part, and RALEIGH OIL COMPANY, a California corporation, formerly known as McKeon Drilling Co., Inc., which name was changed by Decree of the Superior Court in and for the County of Los Angeles, State of California, dated March 4th, 1929, party of the second part.

WITNESSETH:

WHEREAS, on the 27th day of August, 1928, a certain oil and gas lease was made and entered into between W. M. Pargellis, Trustee, of Los Angeles, California, Lessor and Plymouth Oil Company, a Nevada Corporation, Lessee, covering the following described land in the County of Los Angeles, State of California, to-wit:

East 100′ of Lot 24 of Blanchard's Subdivision in the Rancho Santa Gertrudes, County of Los Angeles, State of California, as per map recorded in Book 18, page 69 of Miscellaneous Records in the office of County Recorder of said County;

said lease being recorded in the office of the County Recorder of Los Angeles, County, in Book 7262 at Page 166 of Official Records,

WHEREAS, on the 11th day of September, 1928, said Plymouth Oil Company, a corporation, did make and deliver an assignment of said oil and gas lease unto McKeon Drilling Co., Inc. as assignee, which said assignment was received and accepted by said McKeon Drilling

Co., Inc. and recorded in the office of the County Recorder of Los Angeles County, in Book 7262 at Page 164 of Official Records, Los Angeles County, California,

WHEREAS, on the 12th day of September, 1928, a certain supplemental agreement was made and entered into between said W. M. Pargellis, Trustee, as Lessor, and McKeon Drilling Co., Inc., as Lessee, said agreement being recorded in Book 7295 at Page 156 of Official Records of Los Angeles County, California, which provided for the payment out of oil of One Hundred and Twenty-five Thousand Dollars ($125,000.00),

WHEREAS, under date of April 10th, 1929, a second supplemental agreement was made and entered into between said W. M. Pargellis, Trustee, and McKeon Drilling Co., Inc. recorded in Book 8171, Page 106, Official Records of Los Angeles County, State of California, which supplemental agreement provided for the deepening of said well to the zone known as the "O'Connell" sand, at a depth approximating 6700 feet and the payment out of oil of an additional sum of Thirty Thousand Dollars ($30,000.00),

WHEREAS, due to the encroachment of water into the producing zone in that area of the field, in which this well is located, it was impossible to make a commercial producing well. Oil and gas in large volumes have been discovered in the area embracing said property from the zone of oil sand known as the "Clarke" sand, and wells are being drilled to this "Clarke" sand on property adjoining the property described herein, which will drain the oil and gas from beneath said property. It is there-

fore necessary to deepen said well Reiber #2 to said deeper zone of oil sand known as the "Clarke" sand.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES AND OF THE MUTUAL COVENANTS AND AGREEMENTS HEREIN CONTAINED, THE PARTIES HERETO DO HEREBY AMEND SAID LEASE AND SUPPLEMENTAL AGREEMENTS AS FOLLOWS, and TO-WIT:

A. It is mutually agreed and understood that the drilling requirements of said lease as modified by said supplemental agreements shall be construed to mean that the party of the second part shall at once deepen said Reiber #2 well to a depth of 7500 feet, unless the zone of oil sand known as the "Clarke" sand is successfully penetrated and oil and gas in paying quantities produced therefrom at a lesser depth.

B. It being specifically agreed and understood that the balance unpaid on the sum of One Hundred and Fifty-five Thousand Dollars ($155,000.00), as agreed in the supplemental agreement, dated April 10th, 1929, is first to be paid from said property and that in addition thereto it is understood and agreed that the cost of deepening said well, as herein provided, to the "Clarke" zone, for the purpose of reimbursing the Lessee for such deepening or drilling, is hereby fixed at the sum of Thirty Thousand Dollars, ($30,000.00), regardless of the sum the party of the second part may actually expend.

It being the express agreement that the party of the second part is to collect and receive Eighty-three and eleven fourteenths (83 11/14ths) of all production until

the said sum of One Hundred and Fifty-five Thousand ($155,000.00) plus Thirty Thousand Dollars ($30,000.00), or a total of One Hundred and Eighty-five Thousand Dollars ($185,000.00), is wholly paid. That thereafter said party of the second part is to receive Sixty (60%) per cent of all oil and gas produced from said premises.

C. It is further agreed, that if the said party of the second part shall diligently try and shall fail to bring in a producing well in paying quantities at the greater depth, as hereinbefore provided, due to mechanical or to any reason, then and in that event, the said party of the second part shall be absolved from all damages, liabilities and drilling commitments, and shall not be required to further drill said premises and the lease may cease and determine at the option of the party of the second part, and the said party of the second part may quit-claim the said property to the party of the first part, his successors or assigns, and thereupon all rights and obligations of the parties hereto, one to the other, shall cease and be determined.

It is mutually understood and agreed that wherever the terms and conditions of the said lease, as modified by said Supplemental Agreement, dated the 12th day of September, 1928; the 10th day of April, 1929, and of this agreement conflict, the terms and conditions of this Third Supplemental Agreement shall supersede and control the terms and conditions of said lease, as modified by said Supplemental Agreement, are hereby adopted, accepted and confirmed as the Agreement of the parties hereto.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and the party of the second part has executed this Agreement by its proper officers, thereunto duly authorized, the day and year first above written.

Wm. Pargellis, Trustee,
Party of the First Part as Lessor.

RALEIGH OIL COMPANY
By R. B. McKeon
President

(SEAL) By E. A. Thackaberry
Party of the Second Part—Secretary.

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On this 15th day of July, 1929, before me, Vesta Minnick, a Notary Public in and for the said County and State, personally appeared W. M. PARGELLIS, known to me to be the person who executed the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) Vesta Minnick
Notary Public in and for the County of Los Angeles, State of California.

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On this 20th day of July, 1929, before me, Dolores Bingham, a Notary Public in and for the said County

and State, personally appeared R. B. McKEON, known to me to be the President, and E. A. THACKABERRY, known to me to be the Secretary of the RALEIGH OIL COMPANY, the corporation that executed the within instrument, known to me to be the persons, who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) Dolores Bingham
Notary Public in and for the County of Los Angeles, State of California

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STIPULATED EXHIBIT F, BOTH PARTIES
FORM OF AUTHORIZATION TO ENTER INTO CONTRACT,

"....1929

W. M. Pargellis, Trustee
Los Angeles, Calif.
Dear Sir:—

You are hereby authorized to enter into the best possible contract with a responsible company for the further development of the Reiber Properties at Santa Fe Springs, in which I hold a royalty interest.

.....

STIPULATED EXHIBIT G, BOTH PARTIES AMENDED COMPLAINT FOR INTERPLEADER AND TRUSTEE'S REPORT

"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

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W. M. PARGELLIS, also known as WRIGHT PARGELLIS, Plaintiff, VS McKEON OIL CO., a corporation; RIO GRANDE OIL CO., a corporation; RING PETROLEUM CO., a corporation; GARNER ROYALTY CO., a corporation; PETROLEUM LANDOWNERS LTD., a corporation; PRUDENTIAL FINANCE CO., a corporation; UNION TANK & PIPE CO., a corporation; MIDWAY FISHING TOOL CO. a corporation; PETROLEUM MIDWAY CO. LTD., a corporation; SIMONS BRICK CO., a corporation; CALIFORNIA OIL TOOL SERVICE, a corporation; ELLIOTT CORE DRILLING CO., a corporation; PACIFIC WIRE ROPE CO., a corporation; BARR LUMBER CO., a corporation; PETROLEUM EQUIPMENT CO., a corporation; ROYALTIES TRUSTEE CORPORATION, a corporation; R. F. B. DRILLING CO. INC., a corporation; REID & BERLINER INC., a corporation; ARE-BEE OIL SYNDI-	No. 301667 AMENDED COMPLAINT FOR INTERPLEADER; AND TRUSTEE'S REPORT.

CATE, a trust estate; THOMAS PIKE)
CO., a fictitious firm name owned and)
operated by THOMAS H. PIKE;)
REID & BERLINER, a co-partnership)
composed of THEODORE C. REID,)
GENEVIEVE V. REID, JOSEPH J.)
BERLINER and MABEL E. BER-)
LINER; REID & CAMPBELL, a co-)
partnership composed of THEODORE)
C. REID, GENEVIEVE V. REID,)
M. A. CAMPBELL and NELLIE L.)
CAMPBELL; THEODORE C. REID,)
JULIAN G. KERSTEN, JOSEPH J.)
BERLINER, and M. A. CAMPBELL)
as trustees of ARE-BEE OIL SYNDI-)
CATE, a trust estate; THEODORE C.)
REID; GENEVIEVE V. REID; M. A.)
CAMPBELL; NELLIE L. CAMP-)
BELL; JOSEPH J. BERLINER; MA-)
BEL E. BERLINER; W. W. REID;)
JULIAN G. KERSTEN; THOMAS)
H. PIKE; JOHN ONE; JOHN TWO;)
JOHN THREE; JOHN FOUR; JOHN)
JOHN FIVE; JOHN SIX; JOHN)
SEVEN; JOHN EIGHT; JOHN)
NINE; JOHN TEN; JOHN COM-)
PANY ONE; JOHN COMPANY)
TWO; JOHN COMPANY THREE;)
JOHN COMPANY FOUR; JOHN)
COMPANY FIVE; JOHN COM-)
PANY SIX; JOHN COMPANY)
SEVEN; JOHN COMPANY EIGHT;)
JOHN COMPANY NINE; JOHN)
COMPANY TEN; ALICE B. MOTT;)
GEORGE W. BUSH; MAY T. DOL-)
SON; LEWIS GRIGSBY; W. B.)
HOOK; J. W. H. HODGE; GLADYS)
E. MIESSE; PAUL R. MORROW;)
L. C. NICHOLS; R. L. PEELER;)
H. B. DULANEY; MICHAEL RU-)
DOLPH; F. W. BRENNEMAN;)
MONTGOMERY SMITH; MARY E.)

KLECKNER; ELIZA J. TURN-)
BULL; D. A. WATT; ANNA ZEAH;)
D. W. ROBERTS; GEORGE SIMP-)
SON; J. FARBSTEIN; CASSIA AN-)
DERSON; C. L. BREWER; P. M.)
CASADY; HAL HARDING; JOHN)
JOHNSON; C. C. PREST; MRS. A.)
L. REYNOLDS; W. P. WINSTON;)
T. PAUL JONES; S. W. BUGBEE;)
RALPH EDWARDS; H. E. HAHN;)
F. D. LEBOLD; R. M. STEWARD;)
DAIN STURGES; MRS. M. V.)
NICKELL; BARNEY BROWN; IDA)
M. BUELL; G. M. BURBANK; H. E.)
CARNEY; L. J. CARNEY; M. V.)
JENKS; HOWARD C. CHRISTIE;)
R. H. CHRISTIE; LOUIS CLAUS-)
ING; A. L. CRAWFORD; MOLLIE)
J. CRAWFORD; J. W. CUMMINGS;)
C. J. CURTIS; A. J. DAVIS; A. N.)
DYKE; MYRTLE EVANS; S. W.)
EVERETT; AMELIE FILLIPINI;)
H. H. FLOWERS; E. M. FREEMAN;)
A. F. GLAZIER; MRS. V. S. GUN-)
DRY; PEARLE L. HARRISON;)
MRS. H. D. HORSMAN; G. L. HUY-)
ETT; MAUDE I. IVINS; MARY)
JANE JONES; JUNE M. PAS-)
CHALL; T. P. JONES; WM. E.)
LLOYD; WM. J. LECHNER; J. H.)
LOGIE; A. G. MASPERO; MRS. AN-)
DREA MEHESY; MRS. C. A. Mc-)
COY; F. W. MOSER; MRS. F. V.)
MacFARLAND; OLIVE B. REID; E.)
P. REICKER; JOSEPH RITTIG-)
STEIN; IRENE SABICHI; FLOR-)
ENCE GERMAIN; GEORGE E.)
BUTLER; MRS. S. B. RUDE; MRS.)
FENIAH SKINNER; EDNA SMITH;)
FRANK STUBBS HAL A. THOMP-)
SON; JAMES L. WALKER; JOHN)
R. GILMAN; J. BEVERLY GRIB-)

BLE; J. B. WEAVER; W. H.)
WHEELER; A. T. WHITTAKER;)
NELLIE WEYMOUTH; HELEN C.)
SCOTT; CLINT CLOWLES; E. V.)
MAHONEY; SETH L. ROBERTS;)
ELLEN JONES; CARL YOKUM;)
LESTER R. GODWARD; J. C.)
READ; MATTIE READ; MURIEL)
FULLER COLBURN; NELLIE W.)
BOUGE; FRED. H. SEARS and)
CHAS. W. SEARS.)
)
Defendants.)
)

Plaintiff files this his first amended complaint, and complains and alleges:

I.

That the defendant Garnery Royalty Co. and defendant Rio Grande Oil Co., are and were at all times hereinafter mentioned corporations duly organized, created and existing under and by virtue of the laws of the State of Delaware.

That the defendants McKeon Oil Co., Ring Petroleum Co., Petroleum Landowners Ltd., Prudential Finance Co., Union Tank & Pipe Co., Midway Fishing Tool Co., Petroleum Midway Co., Ltd., Simons Brick Co., California Oil Tool Service, Elliott Core Drilling Co., Pacific Wire Rope Co., Barr Lumber Co., Petroleum Equipment Co., R. F. B. Drilling Co. Inc., and Reid & Berliner Inc., are and were at all times hereinafter mentioned corporations duly organized, created and existing under and by virtue of the laws of the State of California, with their respective principal places of business in the County of Los Angeles, State of California.

That the defendants Reid & Berliner is and was at all times hereinafter mentioned a co-partnership composed of Theodore C. Reid, Genevieve V. Reid, Joseph J. Berliner and Mabel E. Berliner; and the defendant Reid & Campbell is and was at all times hereinafter mentioned a co-partnership composed of Theodore C. Reid, Genevieve V. Reid, M. A. Campbell and Nellie L. Campbell.

That the defendant Are-Bee Oil Syndicate is and was at all times hereinafter mentioned a trust estate known and designated as such and created under and by virtue of the terms of an agreement and declaration of trust entered into in the County of Los Angeles, State of California, and recorded in the office of the County Recorder of said County at some time prior to the 18th day of September, 1923; and the defendants Julian G. Kersten, Theodore C. Reid, Joseph L. Berliner and M. A. Campbell are the duly appointed, elected, qualified and acting trustees and officers of said Are-Bee Oil Syndicate.

That the defendant Thomas H. Pike is and was at all times hereinafter mentioned doing business under the fictitious firm name and style of Thomas Pike Co.

That the defendant Royalties Trustee Corporation is a Corporation; that plaintiff has no knowledge, information or belief relative to the state in which said corporation was incorporated or organized and will ask leave of Court to amend this amended complaint and add such allegation as soon as the same becomes known to plaintiff.

II.

That the defendants John One to John Ten inclusive; and John Company One to John Company Ten inclusive are being sued herein under fictitious names, their true names being unknown to plaintiff and plaintiff will ask

leave of Court to substitute the true names for the fictitious names as soon as the same become known to plaintiff.

III.

That plaintiff is the duly appointed, qualified and acting trustee of and for Theodore C. Reid, Joseph L. Berliner, Genevieve V. Reid and Mabel E. Berliner, both as individuals and as co-partners doing business under the fictitious name of Reid & Berliner; R. F. B. Drilling Co. Inc., a corporation, Are-Bee Oil Syndicate, a trust estate, Reid & Berliner Inc., a corporation, M. A. Campbell, Nellie L. Campbell; Theodore C. Reid, Genevieve V. Reid, M. A. Campbell and Nellie L. Campbell as co-partners doing business under the fictitious name of Reid & Campbell; Reid & Berliner, a co-partnership and Reid & Campbell a co-partnership, as far as concerns the right, title and interest of each and all of said parties in and to that certain oil and gas lease dated the 7th day of November, 1922, between W. A. Swem and Bertha M. Swem and others, as lessors, and C. H. Nickell as lessee of that certain real property located in the Santa Fe Springs Oil District in the County of Los Angeles, State of California, and more particularly described as Lots 22 and 24 of Blanchard's subdivision as per map recorded in Book 18 at page 69 Miscellaneous records of said County; that said Oil and gas lease heretofore referred to was recorded in the office of the County Recorder of said County and State on the 6th day of December, 1922, in Book 1620 at page 176 of Official Records of said County, and subsequently assigned by said Lessees to the trustors above named.

IV.

That as such trustee plaintiff receives, deposits and disburses to those entitled thereto, all sums of money or moneys or other proceeds received from the operation of the oil well or wells on said property heretofore referred to, together with all proceeds, money or moneys received from the sale of equipment on said property and any and all oil, gas and other hydro-carbon substances produced and saved from said property. That plaintiff as such trustee has on hand and in his possession the sum of money as set forth in the account attached hereto as proceeds from the sale of such equipment, oil, gas and other hydro-carbon substances and will hereafter receive other and additional large sums of money from such sales in an amount unknown and not susceptible of computation at this time.

V.

That all the defendants named herein claim some interest in said proceeds on hand and claim some interest in the proceeds to be hereinafter received by plaintiff as such trustee and said defendants base their respective claims by virtue of various leases, sub-leases, assignments, deeds, contracts and transfers, the exact nature and amount of which is known to said defendants, and each of said defendants demands that plaintiff deliver said proceeds or money to him or it in accordance with their various demands.

VI.

That plaintiff has no definite knowledge of the respective rights of said defendants or the nature of the various leases, subleases, assignments, deeds, contracts and transfers and plaintiff is not certain which of said

claimants is entitled to priority, and cannot safely determine for himself which, if any, of said claims, are right and lawful.

VII.

That plaintiff is ready and willing to pay and to distribute said funds on hand and any funds which may hereafter come into possession of plaintiff as such trustee to such persons, firms, trust estates, associations or corporations as the Court may direct and plaintiff has not title to and claims no interest in said fund except as trustee as hereinbefore set out.

VIII.

That this action is brought by plaintiff without collusion with one or more of said defendants or any other person.

IX.

That plaintiff is entitled to extra-ordinary compensation on account of his administration of said trust and particularly on account of the duration of the same and the character and extent of the work required therein and the unusual amount of time and attention required to be devoted thereto, and the complexity of accounts and accounting with relation thereto, and said trustee alleges that a sum equal to Two Hundred Fifty ($250.00) Dollars per month would be a reasonable amount to be allowed by the Court to such trustee as compensation for his services in addition to the actual moneys expended by him in the performance of his duties as trustee.

X.

That it has become necessary for said trustee to employ attorneys to represent him in the preparation and filing

of this action and account and at the hearing herein and in other matters in connection herewith; said trustee has accordingly employed Irvin C. Louis and Harold B. Pool as such attorneys; that the sum of Five Thousand ($5000.00) Dollars would be a reasonable amount to be paid by said trustee to said attorneys for their services in connection herewith unless the hearing or subsequent proceedings hereunder should be long and involved, in which event a greater compensation would be reasonable.

And for a second, separate and further cause of action and for his account, plaintiff alleges:

I.

Plaintiff adopts by reference all of the allegations contained in Paragraphs I, II, III, IV, and V of plaintiff's first cause of action herein as though the same were hereinafter fully set forth.

II.

Plaintiff as such trustee herewith presents to the above entitled court and to the defendants named herein and each of them a full and true account of his trusteeship, such account being hereto annexed marked Exhibit A and made a part hereof to the same effect and extent as if herein set out in full.

III.

Plaintiff adopts by reference all of the allegations contained in Paragraphs IX and X of his first cause of action herein as though the same were hereinafter fully set forth.

WHEREFORE plaintiff prays judgment as follows:

1. That the Court approve the account of the Trustee presented herewith.

2. That the Court authorize and order the payment out of said trust funds of the compensation to said trustees as hereinbefore set forth.

3. That the Court authorize and order the payment out of said trust funds of the compensation to said attorneys for said trustee as hereinbefore set forth.

4. That said defendants and each of them be restrained by an injunction from taking any proceedings or commencing any action against plaintiff in relation to said funds or said claims until an adjudication of the issues presented in the above entitled action has been had.

5. That said defendants and each of them be required to interplead and litigate between themselves their claims to said funds; that plaintiff be authorized to hold said funds subject to the terms of the Declaration under which he was appointed trustee; that the rights, duties and liabilities of plaintiff as such trustee be found and determined.

6. For plaintiff's costs herein incurred, and for such other and further relief as the Court may deem just, equitable and proper.

LOUIS, QUILLAN & POOL,
By I. C. LOUIS
Attorneys for plaintiff.
907 Van Nuys Bldg.,
Los Angeles, California.

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

W. M. PARGELLIS, also known as Wright M. Pargellis, being by me first duly sworn, deposes and says:

that he is the plaintiff in the above entitled action; that he has read the foregoing first amended complaint for interpleader and trustee's report and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

W. M. PARGELLIS

Subscribed and sworn to before me this 9th day of June, 1930.

(Seal) IRVIN C. LOUIS

Notary Public in and for the County of Los Angeles, State of California.

STIPULATED EXHIBIT H, BOTH PARTIES, ORDER APPOINTING RECEIVER

"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

W. M. PARGELLIS, also known as WRIGHT M. PARGELLIS Plaintiff, -vs- McKEON OIL COMPANY, a corporation, et al., Defendants.	No. 301667 ORDER APPOINTING RECEIVER

On the 28th day of October, 1931, after a previous partial hearing and several continuances, this cause came

on regularly for hearing and it appearing that plaintiff was in Central America and would be there for an indefinite period, and that immediate relief is necessary for the protection and preservation of the properties, assets rights and equities of the parties hereto and that said property, assets, rights and equities hereinafter referred to and described should be administered in this Court through a Receiver appointed by this Court and all the parties hereto appeared personally or by Counsel in open Court at this hearing, consents to the making of this Order, IT IS ORDERED, ADJUDGED AND DECREED as follows:

I.

That pending the determination of the above entitled action, Lewis J. Hampton is hereby appointed as Receiver of and for that certain oil and gas lease dated on the 7th day of November, 1922 between W. A. Swem and Bertha M. Swem and others as Lessors and C. H. Nickell as Lessee of that certain real property located in the Santa Fe Springs Oil Field, in the County of Los Angeles, State of California and more particularly described as follows:

Lots 22 and 24, of Blanchard's Subdivision in said County, as per map recorded in Book 18, Page 69 of Miscellaneous Records of said County;

which oil and gas lease was recorded in the office of the County Recorder of said County on the 6th day of December, 1922, in Book 1620 at Page 176 of the Official Records of said County, which said lease now stands in the name of plaintiff herein as trustee, holding all of the rights of the Lessee under said lease together with all

other property, assets, business, equities and rights pertaining to, and arising from, said lease and the operation of the oil well thereon.

II.

That plaintiff, his attorneys, agents and employees and any person acting under his direction shall deliver to the Receiver any and all properties, real, personal or mixed in their possession or under their control.

III.

All creditors, royalty owners, lessors, land owners and all persons claiming or acting by, through or under them, and all sheriffs and marshals and other officers, agents, attorneys, representatives, servants and employees, and all other persons, associations and corporations, are hereby enjoined and restrained from instituting or prosecuting any action at law or suit or proceeding in equity against the plaintiff or said Receiver in any court of law, or equity, or otherwise, or from executing or issuing or causing the execution or issuance, or the issuing out of any court of any writ, process, summons, attachment, subpoena, replevin or other proceeding for the purpose of impounding or taking possession of or interferring with any property in the possession of said plaintiff or of the Receiver, or possessed or owned by the plaintiff as trustee and in the possession of any of his attorneys, agents or employees, and all sheriffs, marshals and other officers and their deputies, representatives and servants, and all other persons, associations and corporations are hereby enjoined and restrained from removing, transferring, disposing of or attempting in any way to remove, transfer or dispose of or in any way to interfere with any prop-

erty, assets or effects in the possession of the plaintiff or of the receiver, or the possession of any attorney, agent or employee; and from doing any act or thing whatsoever to interfere with the possession and management by the receiver of the property and assets above described or in any way to interfere with the receiver in the discharge of his duties, or to interfere in any manner with the administration and disposition in this suit of the property and affairs claimed by plaintiff, or under his control as such trustee, or otherwise; and from exercising or declaring or attempting to exercise or to declare a default or forfeiture on the part of the plaintiff, as trustee, over said properties and assets or on the part of any beneficiary for whom he is acting as trustee.

IV.

Said receiver is hereby authorized forthwith to take and have complete exclusive control, possession and custody of all said property and assets, real, personal and mixed of every kind, character and description within the State of California, and all persons, firms and corporations, including the plaintiff, his attorneys, agents and employees, shall forthwith deliver to the receiver all said property and assets in their possession, and the plaintiff, his attorneys, agents, and employees are hereby directed upon the request of the receiver to endorse, transfer, set over and deliver to the receiver any and all notes, bills of exchange or other documents, or muniments of title outstanding, books of account, records and files held by or in the name of or in the possession or under the control of the plaintiff, or as to which plaintiff has any interest relating to said property, assets, rights and equities.

V.

The receiver is hereby authorized until the further order of this Court to continue, manage and operate said business controlled and operated by plaintiff as trustee, with full power and authority to carry on, manage and operate said business and properties, and buy and sell merchandise and supplies for cash or on credit as may be deemed available by said receiver, and particularly to carry out, perform and fulfill the contracts and obligations of the plaintiff as trustee, and to enter into new contracts incidental to the operation of said business, to the extent that the receiver may deteemine that it is for the best interests of the receivership estate so to do, and in that behalf to appoint and employ such managers, agents, employees, servants, accountants, attorneys, and counsel as may in the judgment of the receiver be advisable or necessary in the management, conduct, control or custody of the receivership estate, and the receiver is hereby authorized to make such payments and disbursements out of said property and assets as may be needful or proper for the preservation and operation of said properties and business. Any appointment of an attorney or attorneys to be first submitted to and approved by a Judge of this Court.

VI.

The receiver is hereby authorized to receive and collect rents, income and profits of any of said properties, whether the same are now due or shall hereafter become due and payable, and to do such things, enter into such agreements, and employ such agents in connection with the management, care, preservation and operation of said

properties as the receiver may deem advisable, and to incur such expenses and make such disbursements as may in the judgment of the receiver be necessary or advisable, including all bills and accrued charges for electric light and power, gas, water, insurance, telephone charges, taxes and charges of the nature thereof, lawfully incurred or imposed upon the property prior to the receivership, and all claims for accrued wages, salaries and expenses of agents and employees for services rendered prior to the date of this order but remaining unpaid at the date hereof, to the end that the operation of said business may not be interfered with or interrupted.

VII.

The receiver is hereby authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become a party to such suits, actions, proceedings at law, in equity, including ancillary proceedings in the State of Federal Courts as may in the judgment of the receiver be necessary or proper for the collection, protection, maintenance and preservation of said property and assets and the conduct of said business, including actions against plaintiff for recovery of any of said property and assets or the proceeds of any thereof, or the carrying out of the terms and provisions of this Order, and likewise to defend, compromise and adjust or otherwise dispose of, any and all suits, actions and proceedings instituted against him as Receiver or against the plaintiff, and also to appear in and conduct the prosecution or defense of any action, suit or proceeding, or to adjust or compromise any action, suit or proceeding now pending in any court by or against

the plaintiff as trustee or otherwise pertaining to said property and assets, where such prosecution, defense or other disposition of such action, suit or proceeding will in the judgment of the receiver be advisable or proper for the protection of said property and assets or of the proceeds derived from any thereof, and in his discretion to compound and settle with all debtors of the plaintiff as trustee, with persons having possession of said or any of said property or assets, or in any way responsible at law or in equity to the plaintiff as trustee, upon such terms and in such manner as the receiver shall deem just and beneficial to the plaintiff or to said properties and assets and the creditors of plaintiff as trustee.

VIII.

The Receiver shall retain possession and continue to discharge the powers and duties aforesaid until the further Order of this Court in the premises; but shall from time to time apply to this Court for such other and further Orders and directions as he may deem necessary or advisable for the due administration of the receivership; and the receiver is hereby vested, in addition to the powers aforesaid, with all the general powers of receivers in cases of this kind, subject to the direction of this Court and the receiver shall from time to time, or when directed by the Court render to the Court full reports of his proceedings and accountings with respect to all monies received and disbursed by him or his agents, said reports to be a complete fiscal and financial statement of conditions.

IX.

The receiver shall from time to time, upon order of the Court therefor, disburse to the various royalty owners interested under said lease as their interests shall appear, such sums and amounts as may be available for such disbursements.

X.

That the net compensation and salary of the receiver for all his services as such, shall be Three Hundred $300.00 CMS. ~~and Fifty~~ Dollars (~~$350.00~~) per month to be drawn by him monthly, which compensation or salary shall not be increased unless so ordered by the Court, but the same shall not cover or include salaries or wages of his said employees or servants.

XI.

The bond of the receiver in the sum of ~~Fifteen~~ Twelve thousand 12,500.00 CMS Dollars ($15,000.00), conditioned that he will well and truly perform the duties of his office and duly account for all monies and property which may come into his hands and abide and perform all things which he shall be directed to do by this Court, with sufficient sureties to be approved by a Judge of this Court, shall be forthwith filed in the office of the Clerk of this Court.

DATED: Nov. 2nd 1931.

CARYL M. SHELDON
JUDGE

STATE OF CALIFORNIA)
ss.
COUNTY OF LOS ANGELES)

I, LEWIS J. HAMPTON do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California; and that I will faithfully discharge the duties of receiver in the above entitled action and obey the orders of the above named Court.

LEWIS J. HAMPTON

Subscribed and sworn to before me
this 2 day of Nov. 1931.
L. E. LAMPTON, COUNTY CLERK
By F. F. Gregg, Deputy
~~Notary~~ ~~Public~~ in and for the
County of Los Angeles,
State of California.

The foregoing constitutes all of the evidence introduced by petitioner and respondent as material to and relating to the cause of action of the petitioner herein. Petitioner claims that respondent is wrongfully in possession of the real property mentioned in petitioner's petition, as well as the oil well thereon, together with the profits therefrom for which petitioner requested an accounting. That thereupon petitioner rested his case and respondent rested his case and the Honorable District Court thereupon made and entered the following minute order:

"At a stated term, to wit: The February Term, A. D. 1932, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the city of Los Angeles, on Friday, the 8th day of July, in the year of our Lord one thousand nine hundred and thirty-two.

Present:

The Honorable George Cosgrave, District Judge.

PLYMOUTH OIL CO., a Corp., Plaintiff,	)	
vs.	)	U-14-C-Eq
McKEON OIL CO., a Corp., Defendant.	)	

This cause comes on for hearing on oral argument. Robert J. Sullivan, Esq., appears for Lewis J. Hampton, receiver in equity of W. M. Pargellis, trustee-petitioner. Spencer Austrian, Esq., appears for the defendant. Ivan G. McDaniel and Spencer Austrian, Esqs., appear for George H. Stoddard, receiver in equity for McKeon Oil Company, a corporation, respondent.

Robert J. Sullivan, Esq., argues on behalf of the said Lewis J. Hampton; Spencer Austrian, Esq., argues for the defendant; and the Court makes a statement.

The Court orders that the petition filed by Lewis J. Hampton, receiver in the State court for W. M. Pargellis, asking this court to direct the receiver, Geo. H. Stoddard, for McKeon Oil Company, to turn over property, be denied, and allows exception to said petitioner."

That on the 18th day of July, 1932, an order having been made in the above entitled matter, which, omitting the title of the court and cause, was in words and figures as follows, to wit:

"Upon motion of William Hazlett, Edna Covert Plummer, and Robert J. Sullivan, Counsel for Petitioner in

the above-entitled matter, and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED that the time within which Petitioner may prepare, serve and file his Bill of Exceptions in the above-entitled matter is hereby extended to and including the 31st day of July, 1932.

Dated July 18, 1932.

GEORGE COSGRAVE
United States District Judge."

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for the respective parties hereto, that the foregoing statement of fact contains all of the evidence given, and proceedings had at the trial of this action, material to the appeal of petitioner and appellant, and that it is correct in all respects, and that the same may be approved, allowed and settled and ordered filed and made a part of the record herein by the Hon. George Cosgrave, Judge of the above entitled Court, who presided at the hearing of said cause, and that said statement may be certified and signed by the Judge upon presentation of this stipulation without further notice to either party hereto, or to their respective counsel.

IT IS FURTHER STIPULATED AND AGREED, by and between the undersigned counsel for the respective parties hereto that for the reason that it is necessary to know the true import of the stipulation as to part of the facts herein, that the testimony of the witnesses herein be set forth verbatim instead of in narrative form, as likewise the exhibits attached to said stipulation as to part of the facts herein; and it is stipulated that

an order of court approving such manner of stating the testimony of witnesses and the exhibits, may be made and entered upon this stipulation.

William Hazlett
WILLIAM HAZLETT

Edna Covert Plummer
EDNA COVERT PLUMMER

Robert J Sullivan
ROBERT J. SULLIVAN
ATTORNEYS FOR PETITIONER.

Ivan G. McDaniel
IVAN McDANIEL

Spencer Austrian
SPENCER AUSTRIAN
ATTORNEYS FOR RESPONDENT

The foregoing statement is hereby approved and allowed by the Honorable George Cosgrave, Judge of the District Court of the United States in and for the Southern District of California, Central division; and, IT IS HEREBY ORDERED, that the testimony of the witnesses as set forth verbatim in said statement and the reproduction of the exhibits verbatim be, and the same are, hereby approved, and allowed upon the stipulation of the parties hereto through their respective counsel.

Dated July 26, 1932.

Geo Cosgrave
JUDGE.

[Endorsed]: Original Equity No. U-14-C In the United States District Court In and for the Southern District of California Central Division Plymouth Oil Company, a corporation, Plaintiff, vs. McKeon Oil Company, a corporation, Defendant. Statement of Fact for Appeal. Filed Jul 26 1932 R. S. Zimmerman, Clerk

By Edmund L. Smith Deputy Clerk William Hazlett and Edna Covert Plummer 918 Security Building Fifth and Spring Streets Los Angeles, California Telephone Tucker 6506 and Robert J. Sullivan Attorneys for Petitioner .

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation Defendant.	In Equity No. U-14-C
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	PETITION FOR APPEAL FROM ORDER ENTERED JULY 13, 1932.

Comes now the petitioner, Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, in the above entitled matter, and prays that he may be permitted to take an appeal from the Order and decision in the above

entitled cause, entered on the 13th day of July, 1932, as follows:

That part which dismissed the petition of petitioner for the recovery of possession of the property described in petitioner's petition, together with the well thereon and for such sum or sums as may be due and owing to petitioner from the proceeds derived from said property, or the well thereon, and from that part of said order which adjudged and decreed that respondent, George H. Stoddard, is entitled to the possession of the property described in petitioner's petition, as against petitioner, Lewis J. Hampton, and all persons claiming under or through him, and all persons for whom he acts, including W. M. Pargellis, Prudential Finance Co., a corporation, Reid and Berliner, a co-partnership, F. R. B. Drilling Co., Inc., a corporation, Reid and Campbell, a *a* co-partnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, and all persons who have purchased or claimed to have purchased any interest in said property by reason of the assignments similar in form to those attached to the partial stipulation of facts filed in the above entitled action, and there marked "Exhibit C", and from the whole of said Order, to the United States Circuit Court of Appeals for the 9th Circuit, for the reasons specified in the assignment of errors, which is filed herewith.

Petitioner desires that an Order be made fixing the amount of security which he shall give and furnish upon said appeal, and that a citation issue herein, as provided by law; that a transcript of the record, proceedings and papers, duly authenticated, may be sent to the United

States Circuit Court of Appeals, for the 9th Circuit at San Francisco, California.

Dated at Los Angeles, California, this 28th day of July, 1932.

LEWIS J. HAMPTON,
Receiver in Equity of W. M. Pargellis, Trustee,
PETITIONER

By:
William Hazlett
WILLIAM HAZLETT
Edna Covert Plummer
EDNA COVERT PLUMMER
Robert J Sullivan
ROBERT J. SULLIVAN
ATTORNEYS FOR PETITIONER

[Endorsed]: Original No. U-14-C In the United States District Court In and for the Southern District of California Central Division Lewis J. Hampton Petitioner vs. George H. Stoddard Respondent Petition for Appeal From Order Entered July 13, 1932. Received copy of the within Petition this 29 day of July 1932 Ivan G. McDaniel D Filed Jul 29 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk William Hazlett and Edna Covert Plummer and Robert J. Sullivan 918 Security Building Fifth and Spring Streets Los Angeles, California, Telephone Tucker 6506 Attorneys for Petitioner.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation Defendant.	In Equity
———	No. U-14-C
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	ASSIGNMENT OF ERRORS ON APPEAL FROM ORDER ENTERED— JULY 13, 1932

Comes now petitioner, Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, and says that there is error on the face of the record in the above entitled matter, and that the decision of the above entitled court on the 13th day of July, 1932, is erroneous and that the findings and order entered in said matter are erroneous in certain portions thereof, and petitioner assigns that said decision, findings and order are erroneous for the following reasons:

EXCEPTION NO. 1

That the Court erred in finding (Finding of Fact I) that thereafter and on August 23, 1923, said Theodore C. Reid and Joseph J. Berliner assigned their interest under said lease to W. M. Pargellis, when the facts indisputably show that Theodore C. Reid and Joseph J. Berliner assigned their interest under said lease in trust to W. M. Pargellis, as Trustee.

EXCEPTION NO. 2

That the Court erred in finding (Finding of Fact V) that on or about August 27, 1923, said W. M. Pargellis sub-leased a portion of the premises hereinbefore referred to, to Plymouth Oil Company, a Nevada corporation, by a lease dated on said date, and that thereafter, and from time to time supplements to said lease were entered into between W. M. Pargellis and McKeon Oil Company, when the facts indisputably show that W. M. Pargellis was a Trustee, and without any authority at all to execute any lease or sub-lease to any of the property referred to in petitioner's petition, and that if an attempt was made to lease or sub-lease any portion of said premises, that such attempt was made on August 27, 1928 and was abortive and void for the lack of authority so to do on the part of the said W. M. Pargellis as Trustee.

And the Court further erred in the same Finding of Fact, in finding that on September 11, 1928 said Plymouth Oil Company did, by an instrument in writing, assign all of its right, title and interest in and to said lease to McKeon Drilling Company, Inc. a California Corporation, when the evidence indisputably shows that

the attempted lease or sub-lease between W. M. Pargellis as a Trustee and the Plymouth Oil Company, a Nevada Corporation, was void for the lack of authority of W. M. Pargellis as Trustee to make, execute or deliver such lease or sub-lease on any of the property described in petitioner's petition.

EXCEPTION NO. 3

That the Court erred in finding (Finding of Fact V) that on said date, (June 4, 1931) said George H. Stoddard qualified and took possession of all of the assets of McKeon Oil Company, including the realty referred to in the petition of Lewis J. Hampton herein, when the evidence indisputably shows that W. M. Pargellis held the property described in petitioner's petition as a Trustee, and did not voluntarily divest himself of title thereto or possession thereof, and that by reason of the abortive and void attempt on the part of W. M. Pargellis as Trustee to lease or sub-lease said premises that said premises never became assets of the McKeon Oil Company or anyone else other than the petitioner herein.

EXCEPTION NO. 4

That the Court erred in finding (Finding of Fact V) that the Prudential Finance Co., a corporation, Reid and Berliner, a co-partnership, F. R. B. Drilling Co. Inc., a corporation, Reid & Campbell, a co-partnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, and each of them expressly consented to the execution of said lease, when the evidence indisputably shows that no express consent was every given to the execution of said alleged lease by any or all of the aforementioned associations, corporations, or co-part-

nerships, and trust estate for the reason that such consent was not expressed in writing, and all evidence of any oral attempt to consent to the execution of said alleged lease was remote hearsay and the conclusion of the witnesses, and incompetent evidence to prove any alleged consent.

EXCEPTION NO. 5

That the Court erred in finding (Finding of Fact VII) that on said date said George H. Stoddard duly qualified and took possession of all of the assets of McKeon Oil Company, including the realty hereof above referred to, when the evidence indisputably shows that the attempts of W. M. Pargellis, as Trustee, to divest himself of title or possession to the property described in petitioner's petition were abortive and void for lack of authority in W. M. Pargellis to so divest himself of title or possession and could not become assets of McKeon Oil Company when the evidence shows distinctly that the petitioner herein is entitled to the possession of said premises together with the well drilled thereon.

EXCEPTION NO. 6

That the Court erred in finding (Finding of Fact VIII) that said respondent, George H. Stoddard, has tendered to the petitioner, Lewis J. Hampton, all sums due under the terms of the lease under which said Receiver holds said property, when the evidence indisputably shows that the attempts of W. M. Pargellis, as Trustee, to lease or sub-lease were abortive and void for the lack of authority in said W. M. Pargellis as Trustee to lease, sub-lease, or otherwise contract concerning the title and possession of said property.

EXCEPTION NO. 7

That the Court erred in finding (Finding of Fact IX) that petitioner has no plain, speedy or adequate remedy at law in the premises, and that the equity of this Court affords petitioner his only relief are untrue, when the evidence and facts of this matter indisputably show that this equitable proceeding for the possession of the real property described in petitioner's petition, together with the well thereon, and the moneys derived therefrom is the only available proceeding to petitioner for the recovery of the possession of said property, said well and said money so wrongfully detained and withheld from him by respondent.

EXCEPTION NO. 8

That the Court erred in finding (Finding of Fact X) that each of the allegations of the amended answer of respondent, George H. Stoddard to the petition of petitioner, Lewis J. Hampton, are true, when the facts and the evidence indisputably show that the possession of said property referred to in petitioner's petition, and the well thereon and the funds derived therefrom belong to petitioner and are wrongfully and without cause detained from said petitioner, and that any attempt on behalf of petitioner's predecessor in interest to divest himself of title or right to possession was and is abortive and void for lack of authority in said petitioner's predecessor in interest so to do.

EXCEPTION NO. 9

That the Court erred in concluding from the findings of fact that the respondent is lawfully entitled to possession of the property described in petitioner's petition, and

that said respondent is entitled to said possession of said real property as against the petitioner, Lewis J. Hampton, and all persons claiming under or through him and all persons whom he represents including W. M. Pargellis, Prudential Finance Company, a corporation, Reid and Berliner, a co-partnership, F. R. B. Drilling Co., Inc., a corporation, Reid and Campbell, a co-partnership, Are-Bee Oil Syndicate, a trust estate, and Reid & Berliner, Inc., a corporation, and each and every person claiming to be a purchaser or holder of an interest in and to any oil or gas produced from said property, by reason of the assignments hereinbefore referred to in forms similar to that set forth in the partial stipulation of facts filed in the above entitled matter, and there marked "Exhibit C", when the evidence distinctly shows, and the findings of fact should show that petitioner is entitled to the possession of said real property as against all persons whomsoever they may be; and when the evidence further shows that petitioner's predecessor in interest was without any authority of whatsoever kind of nature, to divest himself of either the title or possession of said real property, and that he held the same for divers and sundry persons all of whom did not consent to any authority in or confer authority upon said W. M. Pargellis, as Trustee, to in any manner divest himself of either the title or possession to said property.

EXCEPTION NO. 10

That the Court erred in ordering, adjudging and decreeing that the petition of Lewis J. Hampton, filed herein, be dismissed and denied, and that said petitioner take nothing by reason thereof, when the evidence indis-

putably shows, and the findings of fact and conclusions of law should show, that petitioner is entitled to the property described in his petition, as well as the well thereon and the moneys derived therefrom.

The Court further erred in ordering, adjudging and decreeing that the respondent, George H. Stoddard, is entitled to the possession of said property as against petitioner or anyone else, when the evidence indisputably shows, and the findings of fact should show that said property was held by W. M. Pargellis, as Trustee, and that his abortive and void attempts to lease or sublease did not divest him of title or right to possession of said property, and that the title to said property, and the right to possession thereof passed to petitioner herein by order of the Superior Court of the State of California in and for the County of Los Angeles, and that said petitioner under and by virtue of the terms of said Order is entitled to the possession of said property and the well thereon and the proceeds derived therefrom as against all persons whomsoever they may be.

In order that the foregoing assignments of error may appear of record, petitioner presents the same to the Court and prays that such disposition may be made thereof as is meet, in accordance with the laws of the United States.

WHEREFORE, petitioner prays that said order be reversed and that the Court be directed to enter an order for petitioner for the possession of said property, together with the well thereon and for such sum or sums of money as may be due and owing to petitioner from the proceeds derived from said property, and the well

thereon, as set forth in the prayer of petitioner's petition, —all of which is to this Court respectfully submitted.

William Hazlett
William Hazlett
Edna Covert Plummer
Edna Covert Plummer
Robert J Sullivan
Robert J. Sullivan
ATTORNEYS FOR PETITIONER

[Endorsed]: Original No. U-14-C In the United States District Court In and for the Southern District of California Central Division Lewis J. Hampton Petitioner vs. George H. Stoddard, Respondent Assignment of Errors Received copy of the within Assignment of Errors on Appeal From Order Entered—July 13, 1932 this 29th day of July 1932 Ivan G. McDaniel—D Attorney for Respondent Filed Jul 29 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk William Hazlett and Edna Covert Plummer and Robert J. Sullivan 918 Security Building Fifth and Spring Streets Los Angeles, California Telephone Tucker 6506 Attorneys for Petitioner

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation, Defendant.	In Equity No. U-14-C
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	ORDER ALLOWING APPEAL AND FIXING BOND

In the above entitled matter, the petitioner, having filed his petition for an order allowing him to appeal from the Order entered in the above entitled matter on July 13th, 1932;

IT IS ORDERED, that said Appeal be, and the same is hereby, allowed to petitioner, to the United States Circuit Court of Appeals for the Nineth Circuit, from said Order, and that a certified transcript of the record, Statement of Fact for Appeal, Exhibits, Stipulations, and all proceedings herein, be transmitted to said United States Circuit Court of Appeals;

IT IS FURTHER ORDERED, That Appeal Bond be fixed at Two hundred fifty dollars—the same to act as a bond for costs and damages of appeal, if any.

DATED this 28 day of July, 1932.

Geo. Cosgrave
JUDGE

[Endorsed]: Original No. U-14-C In the United States District Court In and for the Southern District of California Central Division Lewis J. Hampton Petitioner, vs. George H. Stoddard Respondent Order Allowing Appeal and Fixing Bond Received copy of the within Order Allowing Appeal and Fixing Bond this 29th day of July 1932 Ivan G. McDaniel D Attorney for Respondent Filed Jul 29 1932 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk William Hazlett and Edna Covert Plummer and Robert J. Sullivan 918 Security Building Fifth and Spring Streets Los Angeles, California Telephone TUcker 6506 Attorneys for Petitioner.

3846753

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation,
Plaintiff,

vs.

McKEON OIL COMPANY, a corporation,
Defendant.

LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee,
Petitioner,

vs.

GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation,
Respondent.

The premium charge for this bond is $10.00 per annum.

EQUITY NO. U-14-C

COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS: That we, LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, as Principal, and FIDELITY & DEPOSIT COMPANY OF MARYLAND as Surety, are held and firmly bound unto George H. Stoddard, Receiver in Equity for McKeon Oil Company, a corporation, the respondent in the above entitled matter, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said defendant, his certain attorney, successors or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of July, 1932.

WHEREAS, Lately at the District Court of the United State*d* for the Southern District of California, Central Division, in a suit pending in said Court, between Plymouth Oil Company, a corporation, plaintiff, versus McKeon Oil Company, a corporation, defendant, (Subcaption) Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, versus George H. Stoddard, Receiver in Equity for McKeon Oil Company, a corporation, Respondent, Equity No. U-14-C, an Order was made and entered against the said Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, wherein and whereby the Petition of said Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, for an*d* Order of said Court for restoration of possession of certain real property in said Petition described, together with a well thereon and the proceeds derived therefrom, and the said Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Trustee, having obtained from said Court leave to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the said Order made and entered as aforesaid, and a Citation directed to the said George H. Stoddard, Receiver in Equity for McKeon Oil Company, a corporation, respondent, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on August 26th 1932.

Now, the condition of the above obligation is such, that if the said Lewis J. Hampton, Receiver in Equity of W. M. Pargellis, Petitioner, shall prosecute his said appeal to effect, and answer all damages and costs, if he fails to make his plea good, then the above obligation to be void; else to remain in full force and effect.

LEWIS J. HAMPTON
LEWIS J. HAMPTON, Receiver in Equity
of W. M. Pargellis, Trustee,
By LEWIS J. HAMPTON
Principal.

[Seal]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND
By W. M. Walker, Attorney-in-Fact
Theresa Fitzgibbons, Surety

STATE OF CALIFORNIA)
) ss:
County of Los Angeles)

On this 29th day of July 1932, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. SMITH
Notary Public in and for the State of California, County of Los Angeles

[Endorsed]: Original No. *No.* U-14-C In the United States District Court In and for the Southern District of California Central Division Lewis J. Hampton, Petitioner vs. George H. Stoddard, Respondent. Cost Bond on Appeal Received copy of the within Cost Bond on Appeal this 29 day of July 1932 Ivan G. McDaniel D Attorney for Respondent. Filed Jul 29 1932 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk William Hazlett and Edna Covert Plummer and Robert J. Sullivan 918 Security Building Fifth and Spring Streets Los Angeles, California Telephone TUcker 6506 Attorneys for Petitioner

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation Defendant.	
———	In Equity
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	No. U-14-C PRAECIPE

TO: R. S. ZIMMERMAN, CLERK OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA:

You will please issue a transcript of the record of the above entitled action, and include therein the following papers:

1. Citation
2. Petition

3. Amended Answer
4. Motion of Respondent to dismiss Petition
5. Findings of Fact, and Conclusions of Law
6. Order of July 13, 1932
7. Statement of Fact for Appeal
8. Petition for Appeal
9. Assignment of Errors
10. Order allowing Appeal, and Fixing Bond
11. Cost Bond on Appeal
12. Clerk's Certificate and this Praecipe

DATED this 28th day of July, 1932.

William Hazlett
WILLIAM HAZLETT
Edna Covert Plummer
EDNA COVERT PLUMMER
Robert J Sullivan
ROBERT J. SULLIVAN
ATTORNEYS FOR PETITIONER

[Endorsed]: Original No. U-14-C In the United States District Court In and for the Southern District of California Central Division Lewis J. Hampton, Petitioner, vs. George H. Stoddard, Respondent. Praecipe Received copy of the within Praecipe this 29th day of July 1932 Ivan G. McDaniel—D Attorney for Respondent Filed Jul 29 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk William Hazlett and Edna Covert Plummer and Robert J. Sullivan 918 Security Building Fifth and Spring Streets Los Angeles, California Telephone Tucker 6506 Attorneys for Petitioner

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

PLYMOUTH OIL COMPANY, a corporation, Plaintiff, vs. McKEON OIL COMPANY, a corporation Defendant.	
LEWIS J. HAMPTON, Receiver in Equity of W. M. Pargellis, Trustee, Petitioner, vs. GEORGE H. STODDARD, Receiver in Equity for McKeon Oil Company, a corporation, Respondent.	No. U-14-C

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 126 pages, numbered from 1 to 126 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and

certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; petition for order to show cause re: restoration of possession of real property; motion to dismiss petition; order denying motion to dismiss; amended answer to petition; findings of fact and conclusions of law; order and judgment; statement of fact for appeal; petition for appeal; assignment of errors; order allowing appeal and fixing bond; cost bond on appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this ..... day of August in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-seventh.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6945

United States
Circuit Court of Appeals
For the Ninth Circuit

LEONARD R. KING,

Appellant,

vs.

SIX COMPANIES, INC., a corporation, and H. S. ANDERSON and W. S. ANDERSON, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Nevada.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. ALBERT DUFFILL and HARRY H. AUSTIN, Las Vegas, Nevada,
For the Plaintiff in Error,

Messrs. McNAMEE & McNAMEE, Las Vegas, Nevada, Messrs. STEVENS & HENDERSON, Las Vegas, Nevada,
For the Defendants in Error. [1]*

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

LEONARD R. KING,
Plaintiff,

vs.

SIX COMPANIES INC., a corporation, and H. S. ANDERSON and W. S. ANDERSON, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company,
Defendants.

PETITION FOR REMOVAL OF CAUSE TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA.

To the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark:

The petition of the defendants above named respectfully represents:

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

I.

The above entitled action has been brought in the above entitled Court and is now pending therein, and that the time within which said defendants are required to answer or otherwise plead has not yet expired.

II.

The said action is of a civil nature, being an action to recover damages for alleged personal injuries. It is an action of which the United States District Courts are given jurisdiction as will appear from the allegations of this petition and the complaint on file in this action.

III.

The value of the matter in controversy in said action is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, as appears from the allegations of plaintiff's complaint on file herein, which is hereby referred to and made a part hereof, [2] wherein plaintiff prays for damages in the sum of $10,303.50.

IV.

Said action involves a controversy which is wholly between citizens of different States and the defendants, your petitioners, are not citizens or residents of the State of Nevada.

At the time when said action was commenced plaintiff was, and at the present time plaintiff is, a citizen of the State of Oklahoma residing therein, and that the defendant Six Companies, Inc., one of your petitioners, when said action was commenced and at the present time is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having its office and principal place of business in the City of Wilmington, in the State of Delaware, and was and is a citizen of the State of Delaware, and at the time when said action was commenced the defendants H. S. Anderson and W. S. Anderson were, and each of them was, and at the present time are, and each of them is, citizens and residents of the State of California.

V.

Your petitioners present herewith a good and sufficient bond as provided by the statute in such cases that they will enter in the District Court of the United States for the District of Nevada within thirty days from the date of the filing of this Petition a certified copy of the record in this suit, and that they will pay all costs which may be awarded by the said District Court in case said Court shall hold that this suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioners pray that this Court proceed no further herein, excepting to make an order accepting the bond presented herewith

and directing that a transcript of the record herein be made for filing in the United States District Court for the District of Nevada.

F. R. McNAMEE,
LEO A. McNAMEE and [3]
FRANK McNAMEE, JR.,
Attorneys for Defendants, Six Companies, Inc.

STEVENS & HENDERSON,
Attorneys for Defendants, H. S. Anderson and W. S. Anderson.

[Endorsed]: Filed Oct. 5, 1931. Wm. L. Scott, Clerk.

State of Nevada,
County of Clark.—ss.

H. S. Anderson being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action and that he makes this verification on behalf of himself and his co-defendant; that affiant has read over the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes the same to be true.

H. S. ANDERSON.

Subscribed and sworn to before me this 2nd day of October, 1931.

[Notarial Seal] FRANK A. STEVENS,
Notary Public.

Receipt of a copy of the foregoing admitted this 3rd day of October, 1931.

ALBERT DUFFILL,
HARRY H. AUSTIN,
Attorneys for Plaintiff.

[Endorsed]: No. 2469. U. S. Dist. Court, Dist. Nevada. Filed Oct. 29, 1931. E. O. Patterson, Clerk. [4]

[Title of Court and Cause.]

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS: That Union Indemnity Company, a corporation of the State of Louisiana, authorized to do a general surety business in the State of Nevada, as Surety, is held and firmly bound unto Leonard R. King in the full and just sum of five hundred ($500.00) dollars, for the payment of which well and truly to be made, said Surety binds itself, its successors and assigns firmly by these presents.

The condition of the above obligation is such that,

WHEREAS, Six Companies, Inc., a corporation, and H. S. Anderson and W. S. Anderson, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company, the defendants in the above entitled action, have petitioned, or are about to petition the above entitled Court for the removal of a certain cause therein pending wherein Leonard R. King is the plaintiff,

and the said Six Companies, Inc., a corporation, and H. S. Anderson and W. S. Anderson, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company, are defendants, to the District Court of the United States for the District of Nevada for further proceedings on grounds in said Petition set forth,

NOW, THEREFORE, if said Six Companies, Inc., a corporation, and [5] H. S. Anderson and W. S. Anderson, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company, shall enter in such District Court of the United States within thirty (30) days from the date of filing of said Petition, a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States if such District Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, said Union Indemnity Company has caused this undertaking to be duly executed and its corporate seal hereto affixed by its officer thereunto duly authorized, this 3rd day of October, 1931.

[Corporate Seal]

UNION INDEMNITY COMPANY,
By E. W. CRAGIN,

Attorney-in-fact.

[Endorsed]: Filed Oct. 5, 1931. Wm. L. Scott, Clerk.

Receipt of a copy of the foregoing admitted this 3rd day of October, 1931.

ALBERT DUFFILL,
HARRY H. AUSTIN,
Attys.

[Endorsed]: No. 2469. U. S. Dist. Court, Dist. Nevada. Filed Oct. 29, 1931. E. O. Patterson, Clerk. [6]

[Title of Court and Cause.]

ORDER FOR REMOVAL.

This cause coming on for hearing upon petition and bond of the defendants herein for an order transferring this cause to the United States District Court, for the District of Nevada, and it appearing to the court that the defendants have filed their petition for such removal in due form of law and that the defendants have filed their bond duly conditioned with good and sufficient sureties as provided by law and that defendants have given plaintiff due and regular notice thereof, and it appearing to the court that this a proper cause for removal to said District Court of the United States:

NOW, THEREFORE, said petition and bond are hereby accepted and it is hereby ordered and adjudged that this cause be and it is hereby removed to the United States District Court, for the District of Nevada, and the clerk is hereby di-

rected to make up the record in said cause for transmission to said court forthwith.

Done in open court this 5th day of October, 1931.

WM. E. ORR,
District Judge.

[Endorsed]: Filed Oct 5, 1931. Wm. L. Scott, Clerk.

[Endorsed]: No. 2469. U. S. Dist. Court, Dist. Nevada. Filed Oct. 29, 1931. E. O. Patterson, Clerk. [7]

COMPLAINT.

Plaintiff complains of the defendants and alleges:

I.

That at all the times hereinafter mentioned, the defendant, Six Companies, Incorporated, was and still is a corporation, organized, created and existing under and by virtue of the laws of the State of Delaware.

II.

That at all the times hereinafter mentioned, the defendants, H. S. Anderson and W. S. Anderson, were and still are co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company.

III.

That at all the times hereinafter mentioned, the defendant, Six Companies, Incorporated, was and still is engaged in the business of building and

constructing a dam in the Colorado River, under a contract with the United States government, at a price in excess of fifty-eight million dollars, and that said dam, or dam project, is popularly known as the Boulder Dam but has been officially designated as Hoover Dam. [8]

IV.

That at all the time hereinafter mentioned, the defendants, H. S. Anderson and W. S. Anderson, co-partners as aforesaid, were and still are engaged in the business of housing and feeding the employees of said defendant, Six Companies, Incorporated, on said dam and dam project, under and by virtue of a contract with said defendant, Six Companies, Incorporated, by the terms of which said defendant, Six Companies, Incorporated, promises to, and does deduct from each pay check issued by it to each of its said employees for labor, on said project, a certain stipulated sum or sums, which it agrees to and does pay over unto the said defendants, Andersons, as such co-partners, for the said housing and feeding of each said employee and that all the buildings, fixtures and appliances, necessary and requisite thereto were and are built, furnished, maintained, and operated, exclusively by these defendants, including the boiler hereinafter mentioned.

V.

That all of the construction camps of said defendants, including all buildings, fixtures and ap-

pliances, and said boiler, referred to in the last above paragraph, and most of the activities of said defendants, in connection with said dam project, are located and carried on in said county and state, in and near the Black Canyon of the said Colorado River, where said dam was and now is being so constructed.

VI.

That in the performance of said contracts, and in connection with, and in furtherance of said work of building said dam, these defendants did, during the early portion of the year 1931, build, erect and maintain large construction camps, buildings and other facilities for hiring men for work on said dam, for keeping accounts of their time and services, for housing and feeding them and for encouraging men to work on said dam, some in said Black Canyon, some at Boulder City near said Black Canyon, and some at other places [9] in the vicinity of said canyon and dam, and that for a long time prior to, and at the time of the injury herein complained of, said camps, buildings and other facilities were and are in active operation for, and in furtherance of said purposes, and that for a long time prior to and at the time of the injury herein complained of, the defendant Six Companies, Incorporated, employed approximately fourteen hundred men in connection with its said work on said dam, all of whom were housed, fed and cared for in said camps and buildings, by said defendants, Andersons.

VII.

That during all of the times herein mentioned, a severe industrial and business depression obtained throughout the entire world, that many men were and are out of employment, who were and are willing to work, and that such condition did and does obtain throughout the entire United States, including the State of Nevada, and that by reason thereof and because of the great publicity given to the construction of said dam, many men were and are encouraged to come to said dam in search of employment, from all parts of the nation.

VIII.

That the summer of the year 1931 was an unusually hot summer in said county, and that the temperatures at the several places where men were employed and kept, immediately prior to the injury herein complained of, in said construction work, often exceeded 120 degrees, Fahrenheit, and that by reason thereof, and of the nature of said work and the low scale of wages obtaining, and of general conditions thereat, many men were overcome with heat and were forced to quit their work on said project and many others did quit, from time to time, and that the defendant, Six Companies, Incorporated, was, therefore, and because of their desire to hasten the work on said dam, immediately prior to and at the time of the injury herein complained of, constantly hiring and employing new men at said camps and for said work. [10]

IX.

That because of the facts hereinabove alleged, many men, for a long time prior to and at the time of the injury herein complained of, came from all parts of the nation to seek work on said dam, under the defendants, and for such purpose did wait, and remain and spend their time about the camps and works of these defendants, waiting, hoping and expecting to be given employment by said defendants, and did sleep of nights upon the porches and about the buildings and on the desert in close proximity to the camps, bunk houses and other buildings and works of the defendants, and that the defendants did, during all such times, and in order to and for the purpose of having men readily available to fill the places of any of defendants' employees who might quit their employment, and for the further purpose of having men readily available, for any new work on said dam which might at any time be commenced, encourage and invite said men, including this plaintiff to wait and remain and spend their time about said premises, and did often furnish or cause to be furnished to such men, including this plaintiff, food, in order that such sojourning, waiting and remaining about said premises might continue.

X.

That said dam and most of the work, done in the construction thereof by defendants, and certain of the said construction camps and buildings, were,

during all the times herein mentioned, located approximately thirty miles from the City of Las Vegas, Clark County, Nevada, which is the nearest town to said dam; that other of said camps, buildings and works, maintained by said defendants, were, at all times herein mentioned, located at a place known as Boulder City, which is the main construction camp for said project, and which is distant from said City of Las Vegas, about twenty four miles, and that most of the men seeking employment on said project, including this plaintiff, had no other means of reaching said project, camps and work, than to walk thereto, from said City of Las Vegas. [11]

XI.

That some several days prior to the injury herein complained of, these defendants installed, in a horizontal position, some few hundred feet from their main dormitory or bunk houses at said Boulder City and adjacent to their main commissary or mess house at said Boulder City, a tubular boiler for the purpose of generating steam for and in connection with said commissary and for other uses and purposes in and about and in connection with the construction work on said dam, and connected the same with pipe lines for furnishing fuel oil to said boiler, water to said boiler and for taking steam away from said boiler for said purposes and uses, and that for some time immediately prior to and at the time of the injury herein complained

of, these defendants were operating and maintaining said boiler and generating steam therein, for said uses, and were, during all such times, using fuel oil, as and for fuel in said boiler.

XII.

That this plaintiff, together with other men from various parts of the country, had been waiting around the said several operations of these defendants at their so-called River Camp in said Black Canyon and at their so-called Boulder City Camp at said Boulder City, and at other places near their said operations, for several days prior to and at the time of the injury herein complained of, for the express purpose, and none other, of securing employment with these defendants on said dam project, and at and upon the invitation of these defendants, so to do; and that on Tuesday, the 4th day of August, A. D. 1931, this defendant, Six Companies, Incorporated, expressly invited and encouraged this plaintiff to remain about said operations and said camps, by stating to this plaintiff that the next succeeding day, to-wit, August 5th, 1931, would be pay day and that certain or some of its employees were sure to quit their employment and that said defendant, Six Companies, Incorporated, did say to this plaintiff that if he, this plaintiff, would "stick [12] around and be here to-morrow," or words to that effect, that it, the said defendant, Six Companies, Incorporated, would "put him on," or words to that effect, meaning

thereby, would give plaintiff employment on said project; that said express invitation to remain, was given this plaintiff by two of the so-called "shifters" or shift bosses in the employ of this defendant, Six Companies, Incorporated, to-wit, a man called "Whitey" and another man, called "Bob Thompson" and that at said time said two men were in the employ of this defendant, Six Companies, Incorporated, as shifters or shift bosses and that they then and there had the authority to hire men for said work for said defendant, Six Companies, Incorporated, and had, immediately prior thereto, been hiring men for work on said job for said defendant, Six Companies, Incorporated.

That these defendants, Andersons, did also invite and encourage, immediately prior to and at the time of the injury herein complained of, this plaintiff and others to wait and remain about said camps and did then furnish some of them, including this plaintiff, food, in order to enable them so to do.

XIII.

That during the night of August 4th, 1931, and in the early morning of August 5th, 1931, and prior to the time of the injury herein complained of, a heavy rain fall took place and occurred at said construction camps and, generally, over the entire south end of said county, and that during said night and early morning, plaintiff, and many other men so waiting employment as aforesaid, undertook to and did sleep upon the porches of certain of said

bunk houses and other buildings at said Boulder City Camp, and while so sleeping, or attempting to sleep, plaintiff, and said other men, became wet and drenched to the skin, from said rain.

XIV.

That at on or about the hour of 3:30 or 4 o'clock in the morning of August 5th, 1931, plaintiff, while thus wet to the skin from said rain, went to said boiler to dry his clothes from the heat [13] of said boiler, and asked permission so to do, of these defendants, which was immediately given him; that there were then and there several other men so waiting employment, who were also drying their clothing from the heat of said boiler, and whose presence there was known to these defendants and to this plaintiff.

XV.

That said boiler at said time, and at the time of the injury herein complained of, was in the exclusive possession and under the exclusive control and management of these defendants, was then and there in operation, generating steam, was located in the open air, uninclosed, and that for some time prior to and at the time of the injury herein complained of, there was a high wind blowing in the vicinity thereof.

XVI.

That at said time, plaintiff took a position at the side of said boiler, in the lee of the wind, and there

sat down to dry his clothing and that his said position was a dangerous position and that the danger thereof was well known to these defendants but was unknown to plaintiff; that while thus sitting, and soon after his arrival at said boiler, an explosion of gas in the fire box of said boiler took place and shot and expelled with great force and heat, flames, fire, burning gas and oil, and hot oil yet unconsumed, onto plaintiff's body, through an opening or openings in the metal wall of the fire box of said boiler, located somewhat under the tubular portion of said boiler containing the flues.

XVII.

That the injuries herein complained of, were the direct and positive result of said explosion and that said explosion occurred by reason of the careless and negligent manner in which these defendants, installed said boiler and then and there operated the same.

XVIII.

That this plaintiff is informed and does believe and therefore [14] alleges the fact to be that these defendants installed and, up to and including the time of the injury herein complained of, operated and maintained said boiler with an automatic oil feed device, designed and intended to feed into the fire box of said boiler, a certain regulated amount of fuel oil at all times, and that plaintiff is informed and does believe and therefore alleges the fact to be that these defendants installed and up to and

including the time of the injury herein complained of, operated and maintained said boiler with an automatic water control device, designed and intended to supply said boiler with the requisite amount of water at all times; that from the time of the installation of said boiler by these defendants, up to and including the time of the injury herein complained of, these defendants employed two men, only, to fire, manage and care for the operation of said boiler during each and every twenty four hour period and that each of said men worked a twelve hour shift, in the management of said boiler, and in addition thereto was required by these defendants, each said twelve hour shift, to look after and manage the operation of defendants' ice machine and cooling towers and other machinery and appliances in the vicinity of said boiler and that when so engaged in any of said last named duties, each said employee was necessarily required to be and was absent from said boiler, and that at the time of the injury herein complained of, each and all of these facts were well known to defendants but were unknown to this plaintiff.

XIX.

That it was the duty of these defendants, under the law, in installing and connecting up said boiler with said automatic fuel feed device, if depending wholly or partially upon such automatic fuel feed device to supply said boiler with the proper amount of fuel at any or all times, to see to it that said automatic fuel feed device would at any and all such

times, feed into said boiler a proper amount of fuel oil under any and all conditions, so as neither to choke the fire box of said boiler with an over supply of fuel [15] oil, nor to supply fuel oil so slowly thereto as to permit the fire therein to die down and permit an accumulation of gas therefrom that might thereafter explode and do injury to persons lawfully in the vicinity thereof; and that plaintiff is informed and does believe and therefore alleges the fact to be, that these defendants did so carelessly and negligently install said automatic fuel feed device that the same would not and did not at all times supply said boiler with the proper amount of fuel oil and that by reason thereof, at the time of the injury herein complained of, gas did accumulate in the fire box of said boiler and did explode and cause the injury herein alleged.

XX.

That at the time of said injury, it was, then and there the duty of defendants, under the law, to operate and maintain said boiler in a safe and careful manner, to the end that persons lawfully in the vicinity thereof, might not be injured by the careless and negligent management and operation thereof, and it was the further duty of the defendants, under the law, knowing of their own careless and negligent management and operation of said boiler, and of the dangers to plaintiff therefrom in his said position at the side of said boiler, to warn this plaintiff thereof, in order that he might not be injured

thereby; that under the circumstances as herein alleged, it was the duty of these defendants to see to it that a proper draft of air was provided for in the operation of said boiler and to that end it was the duty of these defendants to enclose said boiler from the wind, to provide a smoke stack for said boiler of sufficient height to create a draft of air through the fire box of said boiler, to keep the flues thereof clean and free from soot and carbon, all to the end that any and all gas and gasses that might be formed in the fire box of said boiler might be consumed in fire as fast as formed, or drawn out into the atmosphere through the flues and smoke stack of said boiler and not cause an explosion such as injured this plaintiff; that it was, at the time of the injury herein com- [16] plained of, the further duty of these defendants to so regulate the amount of fuel going into said fire box, under any and all conditions, as not to choke or underfeed the fire in said fire box or in any wise permit an accumulation of unconsumed gas therein that might explode and cause injury to this plaintiff or other persons lawfully at said boiler; that it was the further duty of these defendants, at the time of said injury, to keep securely closed, all openings in the walls of said fire box of said boiler from which fire and flames and burning oil and gases might escape or be expelled to burn or injure plaintiff or other persons lawfully in the vicinity thereof; that it was the further duty of these defendants, at said time, to keep a competent man constantly present at said

boiler and in charge thereof, in order that no accumulation of gas or gases might collect in the fire box of the same and explode and injure this plaintiff or other persons lawfully present thereat.

XXI.

That prior to and at the time of the injury herein mentioned, these defendants did totally disregard and violate each and every of their aforesaid duties, and did carelessly and negligently fail and neglect to enclose said boiler from the wind, fail and neglect to provide said boiler with a smoke stack of sufficient height to insure an ordinary draft of air through said boiler, under ordinary conditions, fail and neglect to properly regulate the amount of fuel going into said boiler at said time, fail and neglect to keep the flues thereof clean and free from soot and carbon, fail and neglect to keep the openings closed in the walls of the fire box of said boiler through which the said explosion expelled flames and fire and burning oil and gases and burned this plaintiff as herein alleged, fail and neglect to provide for sufficient draft of air through said fire box and boiler to carry off into the atmosphere any accumulation of gas or gases in said fire box, fail and neglect to keep a competent man constantly present at and in charge of said boiler, fail and neglect to warn this plaintiff of the danger to him in his said [17] position at the side of said boiler, and that by reason thereof and of the careless and negligent acts of these defendants and the careless

and negligent management of said boiler by these defendants, as herein alleged, this plaintiff was severely burned and injured, as will more fully appear hereinafter.

XXII.

That at the time of said injury, said night was dark and stormy and that plaintiff was then and there unaware of the careless and negligent acts of these defendants as herein alleged, except that plaintiff did know that said boiler was not inclosed, and plaintiff was then and there unaware of any danger to him in his said position at the side of said boiler.

XXIII.

That at the time of said injury, and for some little time immediately prior thereto, neither of the defendants, nor any employee of any of said defendants was present at said boiler, though this fact was unknown to plaintiff at said time.

XXIV.

That immediately following said injury, plaintiff appealed to these defendants for medical aid and attention, in order to lessen the effects of his said injuries and reduce the pain and suffering thereof, but the same was denied and plaintiff was compelled to and did wander about said camps, with a strong wind blowing against his burned and exposed person, seeking some means to get to Las Vegas for treatment, and thereby causing him to

suffer much severe pain that would have been somewhat relieved by immediate medical attention, and that several hours elapsed before plaintiff reached a hospital at Las Vegas and was first treated for said injuries.

XXV.

That said explosion, and the flames and fire and burning oil and gases by it expelled from said fire box with such force and violence as herein alleged, severely burned the whole left side of plaintiff's face and head, portions of the top and back of his head, [18] permanently injured his left eye, burned both of plaintiff's hands and arms and all of his chest, the front and top of both shoulders and the greater portion of his abdomen, and that the same caused large blisters and sores upon said portions of plaintiff's body, all of which caused plaintiff to suffer great physical pain and mental anguish; that plaintiff believes and therefore alleges the fact to be, that as a result thereof his eye sight has been permanently impaired; that plaintiff is informed and does believe and therefore alleges the fact to be that as a result of such burns, such an increased load was and has been and now is being placed upon his kidneys as to greatly and permanently weaken and injure said organs and render him susceptible to Bright's disease or Nephritis; that so much of the normal skin structure on those parts of his body hereinabove mentioned has been destroyed that there will be permanent contractions of the replacement skin surfaces, causing permanent deformity and

disuse of the affected parts; that the replacement skin tissue on said portions of plaintiff's body, commonly called scar or connective tissue, is and will permanently be tender and unsightly, easily broken down and is and will be permanently and almost entirely without the special nerve endings and feelings of normal skin; that as a direct result of the shock to this plaintiff, from the happening of said burns and the intense pain and suffering following the same, and resulting therefrom, plaintiff's nerves have been permanently shattered and injured and plaintiff is now and continually will be much more nervous and more easily disturbed than prior thereto, that as a direct result of said injuries, so caused by the negligence and carelessness of these defendants, this plaintiff is now and permanently will be unable to do the same kind of labor as heretofore, all to his damage in the sum of ten thousand dollars.

XXVI.

That as a direct result of said injury, and of the carelessness and negligence of these defendants as herein alleged, plaintiff was [19] confined in the Ferguson-Balcom Hospital at Las Vegas, Nevada, for a period of seven days and was confined thereafter in the County Hospital of Clark County, Nevada, for a period of twenty days and has necessarily incurred and is liable to pay unto said Clark County, Nevada, for such hospital treatment and for medicines and nursing, in an endeavor to cure

himself of said injuries, the sum of Sixty-eight and 50/100 dollars.

XXVII.

That prior to said injury, plaintiff was a strong, able bodied man of the age of twenty-nine years, capable of earning and would have earned, except for said injury, the sum of at least five dollars per day, at any kind of ordinary unskilled work, and that solely by reason of said injuries plaintiff has been unable to work at any kind of work and has lost all his time, to his further damage in the sum of two hundred thirty-five dollars.

Wherefore plaintiff prays judgment against these defendants, and against each and every of them, in the sum of ten thousand, three hundred and three and 50/100 dollars, and for his costs and disbursements herein.

ALBERT DUFFILL
and
HARRY H. AUSTIN,
Attorneys for Plaintiff, Professional Building, Las Vegas, Nevada.

[Endorsed]: Filed Sep. 22, 1931. Wm. L. Scott, Clerk.

State of Nevada,
County of Clark.—ss.

Harry H. Austin, being first duly sworn deposes and says: that he is one of the attorneys for the plaintiff in the above entitled action; that he has

read the above and foregoing complaint, knows the contents thereof and that the same is true, according to the information furnished him by his said client, the plaintiff herein, ex- [20] cept as to such facts as are therein stated on plaintiff's information and belief, and as to those facts, he believes it to be true; that the reason why this verification is not made by said plaintiff is that said plaintiff is not now in said Clark County, Nevada, wherein reside both of plaintiff's attorneys herein.

HARRY H. AUSTIN.

Subscribed and sworn to before me, a Notary Public within and for said County and State, this 22nd day of September, A. D. 1931.

[Notarial Seal] Alfred Boyle,
Notary Public in and for the County of Clark, State of Nevada. My commission expires Sept. 6, 1933.

[Endorsed]: No. 2469. U. S. Dist. Court, Dist. Nevada. Filed Oct. 29, 1931. E. O. Patterson, Clerk. [21]

[Title of Court and Cause.]

DEMURRER.

Comes now the Six Companies, Inc., a corporation, and appearing for itself, but not for the other defendants, and demurs to plaintiff's complaint on file herein, on the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That said complaint is uncertain in the following particulars:

(a) It cannot be determined from said complaint whether this defendant encouraged and invited the plaintiff to wait and/or remain and/or spend his time about the premises upon which the tubular boiler mentioned in said complaint was located and operated. [22]

(b) That it cannot be determined from said complaint what particular portion of the premises or what particular operations of its said camp the plaintiff was invited to "stick around."

(c) That it cannot be determined from said complaint which of the defendants gave the plaintiff permission to go to said boiler to dry his clothes from the heat of said boiler, as stated in Paragraph 14 of said complaint.

(d) That it cannot be determined from said complaint wherein the position taken by the plaintiff at the side of the boiler in the lea of the wind was a dangerous position.

III.

That said complaint is ambiguous for the same reasons that it is uncertain.

IV.

That said complaint is unintelligible for the same reasons that it is uncertain.

F. R. McNAMEE,
LEO A. McNAMEE,
FRANK McNAMEE, JR.,
Attorneys for Defendant,
Six Companies, Inc.

I, Leo A. McNamee, do hereby certify that I am one of the attorneys for said defendant, Six Companies, Inc., a corporation, and make this certificate on behalf of the attorneys for said last named defendant, and that, in my opinion, the foregoing Demurrer is well founded in point of law.

LEO A. McNAMEE.

Due service of the foregoing Demurrer is hereby admitted this 23rd day of January, 1932.

ALBERT DUFFILL and
HARRY H. AUSTIN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 25, 1932. E. O. Patterson, Clerk. [23]

[Title of Court and Cause.]

DEMURRER OF DEFENDANTS, H. S. ANDERSON AND W. S. ANDERSON.

The defendants, H. S. Anderson and W. S. Anderson, come by their attorneys and demur to the complaint herein, on the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them.

II.

That said complaint is uncertain in the following particulars:

(a) It cannot be determined from said complaint whether these defendants or either of them encouraged and/or invited the plaintiff to wait and/or remain and/or spend his time about the premises upon which the tubular boiler mentioned in said complaint was lo- [24] cated and operated.

(b) It cannot be determined from said complaint whether these defendants or either of them invited the plaintiff on or about the hour of 3:50 or 4 o'clock in the morning of August 5th, 1931, to go to said tubular boiler to dry his clothes from the heat of said boiler.

(c) That it cannot be determined from said complaint what particular portions of said camps these defendants or either of them did invite and/or encourage said plaintiff to wait and/or remain about.

(d) That it cannot be determined from said complaint which of the defendants, or their or either of their agents, servants, officers or employees gave the plaintiff permission to go to said

boiler to dry his clothes from the heat of said boiler, as stated in Paragraph 14 of said complaint.

(e) That it cannot be determined from said complaint wherein the position taken by the plaintiff at the side of the boiler in the lee of the wind was a dangerous position.

III.

That said complaint is ambiguous for the same reasons that it is uncertain.

IV.

That said complaint is unintelligible for the same reasons that it is uncertain.

STEVENS & HENDERSON,
Attorneys for said Defendants H. S. Anderson and W. S. Anderson.

I, F. A. Stevens, do hereby certify that I am one of the attorneys for said defendants, H. S. Anderson and W. S. Anderson, and make this certificate on behalf of the attorneys for said last named defendants, and that, in my opinion, the foregoing demurrer is well founded in point of law.

STEVENS & HENDERSON,
By F. A. STEVENS. [25]

Due service of the foregoing Demurrer is hereby admitted this 23rd day of January, A. D. 1932.

ALBERT DUFFILL and
HARRY H. AUSTIN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 25, 1932. E. O. Patterson, Clerk. [26]

[Title of Court and Cause.]

DECISION OF THE COURT ON THE DEMURRERS OF THE DEFENDANTS, HANDED DOWN APRIL 7, 1932.

Minutes of Court, April 7, 1932.

The demurrers of the defendants in this case having heretofore been argued and submitted, IT IS NOW BY THE COURT ORDERED that the demurrer of the defendant Six Companies, Inc., a corporation, to plaintiff's complaint, be, and the same is hereby overruled as to ground one thereof; is sustained as to paragraph (c) of ground two; also sustained as to paragraphs three and four, and is otherwise overruled; and that the demurrer of the defendants H. S. Anderson and W. S. Anderson, co-partners, etc., to plaintiff's complaint is hereby sustained as to ground one thereof. IT IS FURTHER ORDERED that plaintiff be and he is hereby allowed twenty days from and after this date within which to file an amended complaint herein. [27]

In the District Court of the United States, in and for the District of Nevada.

LEONARD R. KING,

Plaintiff,

vs.

SIX COMPANIES, INC., a corporation, and H. S. ANDERSON and W. S. ANDERSON, co-partners, doing business under the firm name and style of ANDERSON BOARDING AND SUPPLY COMPANY,

Defendants.

JUDGMENT ON DEMURRER.

This matter having come on regularly to be heard on the 7th day of March, 1932, before the Court upon the issue of law raised by the Demurrers of the defendants to plaintiff's complaint, Harry H. Austin, Esq., appearing for and on behalf of the plaintiff, and Leo A. McNamee, Esq., appearing for and on behalf of the defendant. Six Companies, Inc., a corporation, and F. A. Stevens, Esq., appearing for and on behalf of the defendants H. S. Anderson and W. S. Anderson, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company, and the Court having heard the arguments on said demurrers and having duly considered the same, made its [28] order on the 7th day of April, 1932, sustaining said demurrers to said Complaint, and further ordering that the plaintiff be allowed twenty (20) days from and after said April 7, 1932,

in which to file an amended complaint, and more than twenty days having expired from the date of said decision and order, and said plaintiff having failed within said period of time to file an amended complaint in said action, and no further time having been granted or asked for,—

NOW, THEREFORE, by reason of the sustaining of the demurrers to said complaint and by reason of the failure of the plaintiff to amend said complaint within the time allowed as aforesaid,—

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by his said action, and that the complaint herein be and the same is hereby dismissed, and that the defendants have judgment for their costs in said action taxed at $14.00.

Done in open Court this 10th day of May, 1932.

FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed May 10th, 1932. E. O. Patterson, Clerk. [29]

[Title of Court and Cause,]

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable, the District Court of the United States, in and for the District of Nevada, and to the Honorable F. H. Norcross, Judge of said Court:

Comes now the plaintiff, Leonard R. King, and says that on the 10th day of May, A. D. 1932, this

Court entered judgment in the above case in favor of the defendants and against the plaintiff, adjudging that plaintiff take nothing by this action, that his complaint herein be dismissed and adjudging that defendants recover of him their costs herein, in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the plaintiff, all of which will in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays an appeal to the United [30] States Circuit Court of Appeals for the Ninth Circuit for the correction of said errors; that such appeal be allowed by this Court; that a citation may be issued as provided by law; that an order be made fixing the amount of security to be given in bond, without supersedeas, to be filed herein and conditioned as the law directs, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit sitting at the City of San Francisco, State of California. And your petitioner will ever pray.

ALBERT DUFFILL
and
HARRY H. AUSTIN,
Attorneys for the plaintiff,
Las Vegas, Nevada.

ORDER ALLOWING APPEAL.

Upon reading the above and foregoing petition of the plaintiff herein, heretofore filed herein and now presented to the Court, and upon the application of the said plaintiff, it is

Ordered that said petition be and the same is hereby granted and said plaintiff is hereby allowed to make an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to have reviewed the judgment heretofore entered herein, that citation therefor issue according to law, that the amount of the bond on appeal be and is hereby fixed in the sum of Three Hundred Dollars and that a certified transcript of the record and proceedings herein be transmitted to the last above named Circuit Court of Appeals at the City of San Francisco, State of California.

Dated at Carson City, Nevada, this 8th day of August, 1932.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed Aug. 5th, 1932. E. O. Patterson, Clerk. [31]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the plaintiff, Leonard R. King, and in connection with and as a part of his petition for appeal herein, alleges that there is error in the record and judgment in this cause, and assigns as errors upon which he expects to rely in the Appellate Court, the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment entered herein, the following:

First Assignment of Error.

That the Court erred in sustaining the general demurrer, to the complaint, of the defendants, H. S. Anderson and W. S. Anderson, the same being paragraph one (1) of their written demurrer as filed, charging the complaint with failure to state facts sufficient to constitute a cause of action against said defendants. [32]

Second Assignment of Error.

That the Court erred in sustaining the special demurrer, to the complaint, of the defendant, Six Companies, Inc., the same being paragraph (c) of grounds II, III and IV of said defendant's written demurrer as filed, which reads as follows:

> "(c) That it cannot be determined from said complaint which of the defendants gave the plaintiff permission to go to said boiler to dry his clothes from the heat of said boiler, as stated in Paragraph 14 of said complaint,"

said ground II, charging uncertainty, said ground III, charging ambiguity, and said ground IV, charging unintelligibility.

Third Assignment of Error.

That the Court erred in entering final judgment in favor of the defendants.

Wherefore, the plaintiff, Leonard R. King, prays that said errors be corrected and that the said judgment of the District Court be reversed.

ALBERT DUFFILL
and
HARRY H. AUSTIN,
Attorneys for the Plaintiff,
Las Vegas, Nevada.

[Endorsed]: Filed Aug. 5th, 1932. E. O. Patterson, Clerk. [33]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That Union Indemnity Company, a corporation of the state of Louisiana, authorized to do a general surety business in the state of Nevada, as surety, is held and firmly bound unto Six Companies, Inc., a corporation, and H. S. Anderson and W. S.

Anderson, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company, the defendants in the above entitled action, in the full and just sum of Three Hundred ($300.00) Dollars, for the payment of which well and truly to be made, said surety binds itself, its successors and assigns firmly by these presents.

The condition of this obligation is such that,

WHEREAS, the above named plaintiff, Leonard R. King, has appeal- [34] ed, or is about to appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment entered in the above entitled Court and cause on May 10th, A. D. 1932, that said plaintiff, Leonard R. King, take nothing by his said action and that his complaint therein be dismissed and awarding costs to the defendants above named,

NOW THEREFORE, in consideration of said appeal and of the premises, if the said plaintiff, Leonard R. King, shall prosecute his said appeal to effect and answer all damages and costs if he fails to make good his plea, then this obligation shall be void; otherwise to remain in full effect, force and virtue.

IN WITNESS WHEREOF, said Union Indemnity Company has caused these presents to be duly executed and its corporate seal hereto affixed by its

officer thereunto duly authorized, this 10th day of August, A. D. 1932.

[Corporate Seal Union Indemnity Company]

UNION INDEMNITY COMPANY,
By E. W. Cragin,
Its attorney-in-fact.

The above and foregoing undertaking and security on appeal is hereby approved this 15th day of August, A. D. 1932.

FRANK H. NORCROSS,
Judge of the United States District Court for the District of Nevada.

[Endorsed]: Filed Aug. 15th, 1932. E. O. Patterson, Clerk. [35]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

You will please prepare a transcript on appeal herein, including the following portion of the record, to-wit:

1. The following Removal papers, to-wit:

(a) Petition of the defendants for removal of this cause from the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, to the United States District Court for the District of Nevada.

(b) Bond on Removal of said cause from said State Court to said United States Court.

(c) Order for Removal of said cause from said State Court to said United States Court.

2. The complaint of the plaintiff. [36]

3. The demurrer of the defendant, Six Companies, Inc., a corporation, in this Court.

4. The demurrer of the defendants, H. S. Anderson and W. S. Anderson, in this Court.

5. The decision of the Court on the demurrers of the defendants, handed down April 7, 1932.

6. Judgment of dismissal, entered May 10th, 1932.

7. The following appeal papers, to-wit:

(a) Petition for and order allowing appeal, and fixing the amount of cost bond.

(b) Assignment of errors.

(c) Cost bond on appeal.

(d) Praecipe for transcript of record on appeal.

(e) Original citation on appeal.

(f) Clerk's certificate to record, stating in detail the cost of certifying the record, cost of printing record and by whom paid.

ALBERT DUFFILL
and
HARRY H. AUSTIN,
Attorneys for Plaintiff and Appellant.

Service of the above praecipe is hereby admitted at Las Vegas, Clark County, Nevada, this 10th day of August, 1932.

F. R. McNAMEE,
LEO A. McNAMEE,
FRANK McNAMEE, JR.,
Attorneys for the Defendant and Appellee,
Six Companies, Inc., a Corporation.
STEVENS & HENDERSON,
Attorneys for the Defendants and Appellees,
H. S. Anderson and W. S. Anderson.

[Endorsed]: Filed Aug. 15th, 1932. E. O. Patterson, Clerk. [37]

[Title of Court and Cause.]

CITATION ON APPEAL.

To Six Companies, Inc., a corporation, and to H. S. Anderson and W. S. Anderson, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company, the above named defendants, and to each and every of them, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, on the Third day of September, A. D. 1932, pursuant to appeal filed in the Clerk's office of the District Court of the United States for the District of Nevada, wherein the above named, Leonard R. King, plaintiff, is

appellant, and the above named Six Companies, Inc., a corporation, and H. S. Anderson and W. S. Anderson, co-partners, doing [38] business under the firm name and style of Anderson Boarding and Supply Company, defendants, are appellees, to show cause, if any there be, why the judgment rendered against the said Leonard R. King, plaintiff and appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable F. H. Norcross, Judge of the District Court of the United States for the District of Nevada, this 8th day of August, A. D. 1932.

[Seal] FRANK H. NORCROSS,
Judge of the District Court of the United States for the District of Nevada.

Service of the above citation at Las Vegas, Clark County, Nevada, is hereby acknowledged this 10th day of August, A. D. 1932.

F. R. McNAMEE,
LEO A. McNAMEE,
and
FRANK McNAMEE, JR.,
Attorneys for the Defendant and Appellee, Six Companies, Inc., a corporation.

STEVENS & HENDERSON,
Attorneys for the Defendants and Appellees, H. S. Anderson and W. S. Anderson.

[Endorsed]: Filed Aug. 15th, 1932. E. O. Patterson, Clerk. [39]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada.—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case above entitled.

I further certify that the attached transcript, consisting of 41 typewritten pages numbered from 1 to 41, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $6.40, has been paid to me by Messrs. Albert Duffill and Harry H. Austin, attorneys for the plaintiff and appellant in the above-entitled cause. [40]

And I further certify that the original citation, issued in said cause, is hereto attached.

WITNESS my hand and the seal of said United States District Court this 20th day of August, A. D. 1932.

[Seal] E. O. PATTERSON,
Clerk U. S. District Court for the District of Nevada. [41]

[Endorsed]: No. 6945. United States Circuit Court of Appeals for the Ninth Circuit. Leonard R. King, Appellant, vs. Six Companies, Inc., a Corporation, and H. S. Anderson and W. S. Anderson, Co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed August 22, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6945

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEONARD R. KING,

(Plaintiff) Appellant,

vs.

SIX COMPANIES, INC. (a corporation), and H. S. ANDERSON and W. S. ANDERSON, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company,

(Defendants) Appellees.

BRIEF FOR APPELLANT.

ALBERT DUFFILL,
HARRY H. AUSTIN,
Professional Building, Las Vegas, Nevada,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 6945

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEONARD R. KING,

(Plaintiff) Appellant,

vs.

SIX COMPANIES, INC. (a corporation), and H. S. ANDERSON and W. S. ANDERSON, co-partners, doing business under the firm name and style of Anderson Boarding and Supply Company,

(Defendants) Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an action for damages for personal injuries alleged to have been received by appellant (plaintiff below) because of the negligence of the appellees (defendants below) in the installation and operation of a steam boiler on the Hoover Dam project in Clark County, Nevada.

The cause was originally commenced in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. Before the time for answering, in that Court, had expired, the defend-

ants joined in a petition to that Court for the removal of said cause to the United States District Court for the District of Nevada. (Transcript, pages 1 to 5.) And upon their filing the required bond (Tr. p. 5) an order was made on the 5th day of October, A. D. 1931, removing said cause to said United States District Court for the District of Nevada. (Tr. p. 7.) Within thirty days after the filing of said cause in said United States District Court, the appellee, Six Companies, Inc., a corporation, served and filed its demurrer to the complaint of the appellant. (Tr. p. 26.) And within said thirty day period, the appellees, H. S. Anderson and W. S. Anderson, likewise filed their separate demurrer to said complaint. (Tr. p. 28.) These demurrers were argued to and heard by the United States District Court at Las Vegas, Clark County, Nevada, on March 7th, A. D. 1932, and on April 7th, A. D. 1932, the Court made its written decision on said demurrers by which the Court overruled the general demurrer of the appellee, Six Companies, Inc., that the complaint did not state facts sufficient to constitute a cause of action against said appellee, but sustained the special demurrer of said appellee, charging that the complaint is uncertain, also ambiguous, also unintelligible in

> "That it cannot be determined from said complaint which of the defendants gave the plaintiff permission to go to said boiler to dry his clothes from the heat of said boiler, as stated in paragraph 14 of said complaint,"

and by which said decision the Court sustained the general demurrer of the appellees, H. S. Anderson and W. S. Anderson, charging that the complaint does not state facts sufficient to constitute a cause of action as against said appellees. (Tr. p. 31.) The appellant was allowed twenty days in which to amend said complaint, but he elected to stand thereon and judgment was thereafter and on May 10th, A. D. 1932, rendered in favor of appellees (Tr. p. 32), from which judgment this appeal is taken. (Tr. p. 33.)

The questions before this Court are, therefore, as follows:

1. Does the complaint state a cause of action as against the appellees, H. S. Anderson and W. S. Anderson?

2. Is the complaint vulnerable to the charges of uncertainty, ambiguity and unintelligibility, made by appellee, Six Companies, Inc.

> "That it cannot be determined from said complaint which of the defendants gave the plaintiff permission to go to said boiler to dry his clothes from the heat of said boiler as stated in paragraph 14 of said complaint"?

If these questions are resolved in appellant's favor, it must follow as the night the day, that the judgment of the lower Court was erroneously entered and therefore should be reversed.

The complaint is, perhaps, somewhat lengthy, but stripped of some of its verbiage, it fairly charges that appellee, Six Companies, Inc., a Delaware cor-

poration, was, at the time of the injury (Aug. 5th, 1931), and is engaged in the building and construction of the Hoover Dam in the Colorado River under contract with the United States government, and that the appellees, H. S. Anderson and W. S. Anderson, co-partners doing business under the firm name and style of Anderson Boarding and Supply Company, were and are engaged in housing and feeding the employees of said appellee, Six Companies, Inc., on said dam project,

> "Under and by virtue of a contract with said defendant, Six Companies, Inc., by the terms of which said defendant, Six Companies, Inc., promises to, and does deduct from each pay check issued by it to each of its said employees for labor, on said project, a certain stipulated sum or sums, which it agrees to and does pay over unto the said defendants, Andersons, as such co-partners, for the said housing and feeding of each said employee and that all the buildings, fixtures and appliances, necessary and requisite thereto were and are built, furnished, maintained, and operated, exclusively by these defendants, including the boiler hereinafter mentioned." (Tr. p. 9.)

That all these operations were located and carried on in Clark County, Nevada, near the Black Canyon of the Colorado River (Tr. p. 10); that because of a world wide industrial depression then prevalent, and the great publicity given to said dam project, many men were and are encouraged to come to said dam in search of employment from all parts of the nation (Tr. p. 11); that because of conditions set forth in

said complaint, such as great publicity, extreme summer heat, great number of men out of employment, low scale of wages, desire of appellees to rush said work, etc., workmen were constantly coming and going and that appellees encouraged and invited, and even sometimes fed unemployed newcomers, in order to have men readily available for any new work on said project or to fill the places of those who might and actually did often quit their employment (Tr. pp. 11, 12); that said project was then approximately thirty miles from the nearest town, Las Vegas, Nevada, and that many had no other means of reaching said project but to walk thereto from Las Vegas, and that such employment seekers, including appellant, often slept on the porches of the bunk houses of appellees and on the desert in close proximity to said camps, awaiting chance to work, and that this practice was known to and actually encouraged by appellees (Tr. p. 12);

> "That some several days prior to the injury herein complained of, these defendants installed, in a horizontal position, some few hundred feet from their main dormitory or bunk house at said Boulder City and adjacent to their main commissary or mess house at said Boulder City, a tubular boiler for the purpose of generating steam for and in connection with said commissary and for other uses and purposes in and about and in connection with the construction work on said dam, and connected the same with pipe lines for furnishing fuel oil to said boiler, water to said boiler and for taking steam away from said boiler for said purposes and uses, and that for some time immediately prior to and at the time of the injury herein complained of, these defend-

> ants were operating and maintaining said boiler and generating steam therein, for said uses, and were, during all such times, using fuel oil, as and for fuel in said boiler" (Par. XI of Complaint, Tr. p. 13);

that the appellees (please note that these allegations are all in the plural) invited said unemployed men, including this appellant

> "to wait and remain and spend their time about said premises, and did often furnish or cause to be furnished to such men, including the plaintiff, food, in order that such sojourning, waiting and remaining about said premises might continue" (Tr. p. 12);

that the night of August 4th, A. D. 1931, was dark and stormy and that a heavy rainfall then took place at said camps of these appellees and over the entire south end of Clark County and that appellant, then so awaiting work and sleeping on the porch of one of appellees' bunk houses, became wet and drenched to the skin from said rain and went to said boiler to dry his clothes from the heat of said boiler,

> "and asked permission so to do, of *these defendants,* which was immediately given him; that there were then and there several other men so waiting employment, who were also drying their clothing from the heat of said boiler, and whose presence there was known to these defendants and to this plaintiff." (Tr. p. 16.)

Then follows the allegation that the boiler was in the exclusive possession and under the exclusive control and management of these defendants, and was in

operation generating steam, was located in the open air, uninclosed and that a high wind was then blowing (Tr. p. 16); that appellant took a position at the side of said boiler, in the lee of the wind, and there sat down to dry his clothes; that his position was a dangerous position and that the danger thereof was well known to appellees but was unknown to appellant, and that appellant was severely burnt and injured by an explosion of gas in the fire box of said boiler, by its being forced out through openings in the metal wall of said fire box of said boiler, located somewhat under the tubular portion of said boiler containing the flues (Tr. p. 17); that said boiler was fed with fuel oil as fuel and appellees were negligent in the installation and operation of said boiler, specifying improper automatic fuel control device, failure to keep openings in fire box closed, failure to provide competent men in charge of boiler, absence of fireman at time of accident, improper draft—uninclosed from wind, smoke stack too short, failure to warn appellant of danger, boiler in constant operation but with only two attendants, each working a twelve hour shift and having also other duties to perform requiring their presence away from said boiler (Tr. pp. 17 to 21); and that appellant was unaware of each and all of these items of negligence, except that he did know that said boiler was uninclosed. (Tr. p. 22.) The complaint then describes the injuries, alleges the refusal of appellees to assist appellant with any immediate relief measures, that he was forced to be about with much skin surface blistered, in a high wind before securing even first aid, specifies his allegation of

damage and prays for judgment in the sum of $10,303.50.

SPECIFICATION OF ERRORS.

1. The Court erred in sustaining the general demurrer to the complaint, of the appellees, H. S. Anderson and W. S. Anderson.

2. The Court erred in sustaining the special demurrer, to the complaint, of the appellee, Six Companies, Inc., the same being paragraph (c) of grounds II, III and IV of said appellee's written demurrer as filed, which reads as follows:

> "(c) That it cannot be determined from said complaint which of the defendants gave the plaintiff permission to go to said boiler to dry his clothes from the heat of said boiler, as stated in Paragraph 14 of said complaint,"

said ground II, charging uncertainty, said ground III, charging ambiguity, and said ground IV, charging unintelligibility.

3. The Court erred in entering final judgment in favor of appellees. (See Assignment of Errors, Tr. p. 36.)

BRIEF OF THE ARGUMENT

CONCERNING

1. THE FIRST SPECIFICATION OF ERROR.

The demurrer of the appellees, H. S. Anderson and W. S. Anderson, to the complaint of the appellant, was sustained by the lower Court on ground one thereof, to-wit:

> "That said complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them." (Tr. pp. 31, 29.)

But no memorandum was attached to the Court's order, or any written opinion filed, to indicate the exact fault in the complaint or the exact point or points made by said appellees, which the Court deemed well taken. It therefore becomes necessary, in this argument, to analyze, generally at least, the whole complaint, with particular mention of those points most strongly relied upon by counsel in oral argument below.

The appellant believes that the complaint can be and should be upheld, upon the application of a very few well settled principles of tort law, which are not at all difficult of application to the facts charged in this complaint. We will proceed to so show, and then return to the particular points stressed by these appellees in their oral argument in the lower Court.

> "Most wrongs may be committed either by one person or by several. When several participate, they may do so in different ways, at different times, and in very unequal proportions. One may plan, another may procure the men to execute, others may be the actual instruments in accom-

plishing the mischief, but the legal blame will rest upon all as joint actors."

Cooley on Torts (4th Ed.), Vol. 1, Sec. 75.

Nor do we find the rule greatly changed when limiting our investigation to liability for unintentional injury.

Cooley on Torts (4th Ed.), Vol. 1, Sec. 84 et seq.

Under the heading, NEGLIGENCE, we find in *Corpus Juris,* the rule stated thus:

"If the concurrent negligence of two or more persons combined together results in an injury to a third person, they are jointly and severally liable and the injured person may recover from either or all; the concurring negligence of one is no excuse or defense to another; each is liable for the whole, even though another was equally culpable, or contributed in a greater degree to the injury; no consideration is to be given to the comparative degrees of negligence or culpability, or the degrees of care owing; and further inquiry as to proximate cause is not pertinent. While, in order to create a joint liability, the negligent acts of the parties sought to be charged must have concurred in producing it, yet, where there is the necessary concurrence in producing the effect or result, or, in other words, where the negligence of two or more persons naturally and directly combines and co-operates to produce a single, indivisible injury to a third person, the rule that the persons guilty of the negligence are jointly and separately liable applies not only where the tort-feasors are acting together, or there is a common design or purpose, or concert

> of action, or a breach of a common duty owing by them, but also where their acts of negligence are separate and independent, there is no voluntary, intentional concert of action between or among them, no community of design, or no common duty resting upon them. Where two persons have entered upon a single undertaking together, both are liable for an injury resulting from the negligence of one in carrying it out."
>
> 45 *Corpus Juris,* page 895, Sec. 476.

The principles of law announced in the last above quotation, are so elementary that we deem the citation of other authorities unnecessary. And their application to the facts charged in this complaint, plainly require, in our opinion, a conclusion different from that arrived at by the lower Court.

It will be observed that almost throughout, the appellant has used the plural in his charges of negligence, and in his charges setting forth the duty or duties violated by the appellees. With this fact in mind, it is difficult for appellant to see the reason for sustaining the general demurrer of one tort-feasor and not that of the other. The best guess that we can make on this, is that the lower Court was led into error by anticipating what our evidence would be. And this suggestion is prompted by the Court's ruling on the special demurrer of the appellee, Six Companies, Inc. The Court overruled the general demurrer of said appellee, but sustained its special demurrer, charging the complaint with uncertainty, ambiguity and unintelligibility in its failure to state which of the appellees invited appellant to said boiler. (Tr.

p. 31.) We will return to this feature of the case in our argument under the second specification of error. It would necessarily follow that if our complaint states no cause of action against the appellees, Andersons, and our invitation to the boiler was given by them, there would be no cause of action against the other tort-feasor, Six Companies, Inc., assuming that liability depends wholly upon appellant's status as an invitee at the boiler. But to indulge in this assumption, forces one to entirely overlook a vital allegation in this complaint, based upon a fundamental rule of tort law as old as the law itself. For even though it should be held that appellant was merely a licensee at the boiler, as strenuously maintained by appellees, the complaint still charges that he was in a position of danger; that that fact was well known to appellees but unknown to appellant. (Paragraph XVI of Complaint, Tr. p. 17.) And the complaint also contains the allegation that it was the duty of these appellees to warn appellant of his danger (Paragraph XX of Complaint, Tr. p. 19), and that they failed so to do. (Paragraph XXI of Complaint, Tr. p. 21.) So that even though appellant was but a licensee, or even a trespasser, these allegations give rise to a cause of action.

45 *Corpus Juris,* page 749, Sec. 145;

Cooley on Torts (4th Ed.), p. 240, Sec. 249;

Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154 (Opinion by Mr. Justice Cooley);

Lowe v. Salt Lake City, 13 Utah 91, 44 Pac. 1050;

Brown v. Boston & M. R. R., 73 N. H. 568, 64 Atl. 194;

Janosky v. Northern Pacific Ry. Co., 57 Mont. 63, 187 Pac. 1014;

Gesas v. Oregon Short Line R. Co., 33 Utah 156, 93 Pac. 274;

Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

And it will be seen from the above authorities that said duty may be breached either by active conduct or by omission to act.

Going back, for a moment, to the question of whether or not there is joint liability, let us assume that the appellee, Six Companies, Inc., installed the boiler in question, connected it up with its automatic fuel and water feeding devices and turned it over to the appellees, Andersons, who alone operated it, we will say, in connection with their mess hall and that it had no other function to perform in the building of Hoover Dam. Let us further assume that there was negligence in the installation thereof by Six Companies, Inc., and separate negligence in the operation thereof by the Andersons. In such event, are we compelled to proceed separately against such tort-feasors? We think not. It might be very difficult to prove that the negligence of Six Companies, Inc., alone, in such case, caused the injury, or the exact amount thereof that was directly attributable to the negligence of said Six Companies, Inc. And the same might be true of the negligence of the Andersons, under such assumption. Does that leave us without a remedy? Surely not.

"Where, although concert is lacking, the separate or independent acts or negligence of several

combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it."

38 *Cyc.* page 488, subject, Torts;

The Adour, 21 F. (2d) 858;

Smith v. Floyd County et al., 137 S. E. 646, 36 Ga. A. 554;

Scearce v. Mayor and Council of Gainesville et al., 126 S. E. 883 (Ga. A. 1925);

Chambers et al. v. Cox, 130 So. 416 (Ala. 1930);

Pendleton v. Columbia Ry. Gas & Elec. Co. et al., 131 S. E. 265, 133 S. C. 326;

Cleveland, C., C. & St. L. Ry. Co. v. Mann, 132 N. E. 646, 76 Ind. 518 (1921);

State ex rel. Blythe et al. v. Trimble, 258 S. W. 1013 at 1016 et seq., 302 Mo. 699;

Robertson et al. v. C. B. & Q. R. Co. et al., 188 N. W. 190, 108 Nebr. 569;

Hancock v. Steber, 204 N. Y. Supp. 258;

Daly v. Singac Auto Supply Co., 135 Atl. 868, 103 N. J. L. 416 (1927);

Gordon v. Opalecky, 137 Atl. 299, 152 Md. 536 (1927);

O'Neil v. Rovatsas, 206 N. W. 752, 114 Nebr. 142 (1925);

Hunt v. Rowton, 288 Pac. 342, 143 Okl. 181 (1930);

Washington & G. R. Co. v. Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. Ed. 1101.

And so, where plaintiff alleged that while employed on a steamboat he was injured by the falling of a coal bucket operated by one C, and that C was negligent in using defective machinery, and in operating it, and that the steamboat owner was negligent in not providing him a safe place for work, and in not warning him of the danger, it was held that, as the alleged acts of negligence of C and the steamboat owner, although distinct in themselves, concurred in producing the injury, their liability was joint as well as several.

Brown v. Coxe, 75 Fed. 689.

What is concurrent negligence?

> "Concurrent, as distinguished from joint negligence, arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently. That the negligence of another person than the defendant contributes, concurs or cooperates to produce the injury is of no consequence. Both are ordinarily liable. *And unless the damage caused by each is clearly separable, permitting the distinct assignment of responsibility to each, each is liable for the entire damage.* The degree of culpability is immaterial."
>
> *Shearman and Redfield on Negligence* (6th Ed.), Sec. 122;
>
> *Robertson v. C. B. & Q. R. Co.,* 108 Nebr. 569, 188 N. W. 190;
>
> *Hillman v. Newington,* 57 Cal. 56.

So that in the case at bar, we hardly feel called upon to show that there was community in the wrong-

doing, between these appellees, or that they were engaged in a joint undertaking. Although we remark that it is but our assumption above that precludes the idea, in the face of this pleading, especially as to the operation of this boiler in connection with the mess hall of the appellees, Andersons. The complaint alleges that Six Companies, Inc., undertake to build the dam. To do so, they must engage labor. Labor must be housed and fed. Appellees, Andersons, undertake to do this, for profit. What benefits one, in this respect, benefits the other. Both were interested in encouraging men to work on the dam, and if we follow the complaint that the boiler was used in connection with the Anderson mess hall, even though we adhere to the assumption that the negligent acts of each were separate from each other, which we have tried to show will not defeat us, we still, in our minds, have a community of purpose and joint undertaking as to the conduct of the mess hall. Without the Six Companies, Inc., there would be no men there to feed. The Andersons are doing only what the Six Companies, Inc., itself would have to do, were the Andersons not there to take this burden from the Six Companies. And we have alleged that the Andersons receive their pay by deductions made by Six Companies, Inc., from the pay check of each employee. To put it another way, if the business in which the Andersons are engaged is entirely separate and distinct, so as to make their negligence separate negligence, how would they fare should we brush Six Companies, Inc., out of the picture entirely in our assumptions or in our reasoning? With Six Com-

panies, Inc., out of the picture, there would be no men to feed. Appellees, Andersons, would have to close up shop the first meal, for want of patronage. For it is the work of the Six Companies, Inc., and the great publicity given to it, as we have alleged, that brings men to this commissary to eat. And where there is community of design, or a joint undertaking, there is most certainly a joint liability. No one can question this law. We content ourselves with but a very few authorities.

38 *Cyc.* page 489, subject Torts;
Sutherland on Damages (3rd Ed.), Sec. 137;
45 *Corpus Juris,* p. 896, Sec. 476, p. 897, Sec. 476;
20 *R. C. L.* p. 149, Sec. 122;
Cooley on Torts (4th Ed.), p. 282, Sec. 86;
Oliver v. Miles, 110 So. 666 (Miss. 1926);
Consolidated Ice Machine Company v. Keifer, 134 Ill. 481, 23 Am. St. Rep. 688;
45 *Corpus Juris,* p. 895, Sec. 476 (quoted above).

In the *Consolidated Ice Machine* case, above cited, it was insisted with great earnestness that the defendants could not be jointly liable, because, as said, they did not cooperate and unite in the commission of a tort, and, in respect of their negligence, that the brewing company owed the deceased no duty, and that where negligence is relied upon as the ground of recovery, the duty must be joint, in order to make the liability joint.

The facts were that the ice-machine company undertook to erect a refrigerator plant for the brew-

ing company, at its brewery, which included a large iron tank. The brewing company was to fix the location for the plant, and make and put in proper supports for the tank. It selected its engine room for this purpose, and the iron tank was to be set upon supports eighteen or twenty feet from the ground. The brewing company furnished a support for the tank, a truss made of two wooden beams, bolted together, as one support, and the wall of the engine room as the other support. When the truss was completed the superintendent of the ice-machine company told the president of the brewing company that it was insufficient, and never would support the tank, who replied in substance that it would do. The ice-machine company placed the tank upon the support, sent deceased, its employee, to go upon the roof of the engine house and fit in it the heater. The tank was being filled with water, and while deceased was on the roof performing his duty, the tank fell, taking with it part of the roof, and precipitating deceased to the floor and to his death. The Court said:

> "It is true, the work was apportioned among them; but this does not change the common purpose and object of their several acts. * * * The Brewing Company was negligent in providing a structure which was unsafe and insufficient, whereby deceased incurred an extra peril, when at his work, not incident to his employment. The ice-machine company was negligent in directing deceased to work in this place of danger, it having knowledge, and he being without notice or knowledge, of such danger, and the successive concurrent negligence of appellants thus united in causing the death of Keifer. * * *

> "And when the negligence of two or more persons directly concurs to produce the injury, although one may have undertaken one part, and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be jointly liable. The test seems to be, whether or not the negligence of each directly contributed in producing the injurious result."

This opinion quotes from Cooley on Torts, Hilliard on Remedies for Torts, Deering on Negligence, Wharton on Negligence, cites Shearman and Redfield on Negligence, Thompson on Negligence as well as many reported decisions.

In *Oliver v. Miles,* cited above, and which is also cited in *Cooley on Torts* (4th Ed.) p. 282, Sec. 86, two men were hunting birds together and in their shooting across a highway, a boy was injured by a shot. It was impossible to determine which defendant fired the shot which hit the boy, but both were held liable.

Hundreds of cases might be cited to sustain this principle of law, joint liability, where there is community of interest in an undertaking. If there is any difficulty in the case at bar, it will not be in proving the law, but in applying it. And to our minds, there can be no difficulty here, except by indulging in assumptions which are contrary to the direct allegations of this pleading.

We have all been taught, jurists, lawyers and laymen alike, that the law is reason. In our assumption

of separate and independent acts of negligence, where is the law, or where the reason for holding one party liable for something another party does? We presume that our worthy opponents may try to reason thus. And so they could do if principles of law were but dogmatic assertions. But the common law of England grew, not from dogma, but from ages of experience. And so we often find the Courts applying legal principles with great elasticity, in order to do justice between the parties. So much is it so, that we all know that in Chancery, the Chancellor may, and often does, run contrary to the law. We trust that this Court will not confuse this, as a case in Chancery. But seriously, if it did, the equities would prevent any running contrary to law.

In *Hillman v. Newington,* 57 Cal. 56 (supra), an old California case, the plaintiff was entitled to the use of 400 inches of water flowing in a creek; the defendants severally diverted water from the stream so as, in the aggregate, to diminish the flow available to the plaintiff to a quantity less than 400 inches. The Court held that a joint action for damages and to restrain the defendants from further such diversion, would lie. We respectfully call this Court's attention to the arguments of counsel in that case. The same reasoning which we anticipate from our opponents, was used in that case, but if that reasoning prevailed, the plaintiff would be without a remedy. So in our assumption, in the case at bar. Happily, such is not the law. For if Six Companies, Inc. were guilty of even separate negligence in installing the boiler, and the Andersons were guilty of separate

negligence in its operation, and each contributed to the injury, in however slight a degree, both are liable. And, as pointed out in the *Hillman* case, were the law otherwise, we would be confronted with the anomaly of a wrong without a remedy. In tracing this idea, is it necessary to go beyond our present day law? Must we hark back to the old case of

Scott v. Sheppard, 2 W. Black 892, S. C., 3 Wils. 403, S. C., 1 Smith's Lead. Cas. 466;

where a lighted squib composed of gunpowder was thrown into a market place, landing upon the standing of Yates, who to prevent injury, threw it off his standing onto the standing of Willis, and so on several times until it struck plaintiff and put out one of his eyes? Or even to a later case, quite a landmark in the law, which originated in a justice's court,

Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234,

where Guille was sued for entering the plaintiff's close, and treading his roots, vegetables etc. in a garden in the city of New York? Guille's body was hanging out of the car of a balloon, in which he too hastily descended to the earth. A crowd, to succor him, also entered plaintiff's close. The damage done by Guille himself, was about $15.00. But the crowd did much more. The justice was of the opinion that the defendant was answerable for the full $90.00, including damage done by the crowd, and on appeal this judgment was affirmed.

The appellant, in the case at bar, maintains that a fairly modern case, the case of *The Adour,* 21 F. (2d) 858, is directly in point in support of his claim, on

this assumption of what the evidence in the case may possibly be.

And in an action for the death of plaintiff's intestate, by an explosion of oil, against one furnishing the oil, and the oil company from which such one purchased it, the complaint was held not subject to demurrer for failure to show concerted action, collusion or conspiracy to establish joint liability.

Cabe v. Ligan, et al., 115 S. C. 376, 105 S. E. 739 (1921).

Where, absent joint enterprise, two buildings fell and demolished plaintiff's building, it was held that the two building owners were properly sued jointly.

Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744. (Cited in *Sutherland on Damages* (3d Ed.) Sec. 137 (note 2) and in *Cooley on Torts* (4th Ed.), p. 282, Sec. 86.)

Here again we are compelled to anticipate our opponents who may cite authority to the effect that there is no joint liability for separate acts of negligence, in the absence of joint undertaking or joint enterprise. We will try to be brief and quote:

> "There seems to be considerable contrarity of opinion among the authorities on the question whether separate and distinct acts of negligence, committed by different persons, which unite and culminate in injurious results, constitute joint liability of the different persons committing the separate tort so as to make each responsible for the entire result. There are numerous authorities on both sides of this question. 26 R. C. L. 763, 764; 29 Cyc. 484-488; Day v. Louisville Coal &

Coke Co., 60 W. Va. 27, 53 S. E. 776; 10 L. R. A. (N. S.) 167; Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co., 110 Va. 444, 63 S. E. 73, 24 L. R. A. (N. S.) 1185; Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93. It is clear, however, that joint liability exists for separate acts of negligence where there is a common design or purpose or concert of action in the commission of the separate acts, or where such separate acts of negligence are concurrent as to time and place and which unite in setting in operation a single force which produces the injury. See the same authorities."

Troop v. Drew, 150 Ark. 560, 234 S. W. 992.

And,

"Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it."

38 *Cyc.* p. 488 (and long list of cases).

And if this Court feels it necessary to investigate a few cases on liability in joint undertaking, we submit the following:

Keiswetter v. Rubenstein, et al., 236 Mich. 36, 209 N. W. 154, 48 A. L. R. 1049;

Lucey v. John Hope & Sons Eng. & Mfg. Co., et al., 45 R. I. 103, 120 Atl. 62;

Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 Pac. 385;

Alabama Great So. Ry. Co. v. Hanbury, 161 Ala. 358, 49 So. 467;

Cullinan v. Tetrault, 123 Me. 302, 122 Atl. 770, 31 A. L. R. 1330;

East Ohio Gas Co. v. O'Hara, 17 Ohio App. 352;

Ward v. Meeds, 114 Minn. 18, 130 N. W. 2;

Terreau v. Meeds, 114 Minn. 517, 130 N. W. 3.

An exhaustive annotation on what amounts to a joint adventure, generally, is to be found in the note in 48 *A. L. R.* 1055.

The relationship once established, the legal rights and obligations of the several adventurers in respect to their enterprise are substantially those of partners.

In re Taub, 4 F. (2d) 993 (Bkcy. case).

"Hence the only theory on which one may be charged with the negligence of another is that each is engaged in the performance of the plans which all have agreed upon and which are as personal to one as to another. It is a sort of a partnership, as it were."

Berry's Law on Automobiles (2d Ed.), Sec. 322.

To the same effect see,

Wentworth v. Town of Waterbury, 96 Atl. 334.

How much more simple would our task have been, on this general demurrer, had the lower Court indicated the supposed point of weakness in the complaint. We perhaps should apologize to this Court for consuming so much of its time. Yet, how else is the matter to be handled? The last question, joint undertaking, which we have barely mentioned, leads

into the field of imputed negligence, and so on. A whole brief might be prepared on this question alone. But while in automobile cases, this phase of the law—usually invoked against injured guests in automobile accidents—is rapidly filling the books with imputed negligence cases, we will not attempt to even open the field in the case at bar. We have charged joint negligence in our pleading. Certainly there is no occasion for arguing "imputed negligence" on a demurrer, before trial. In fact, the same applies to most of what we have hereto said, in our opinion. Again, we have charged that these appellees knew of appellant's dangerous position at the side of the boiler, and failed to warn him and that by reason of their negligence, he was injured. The lower Court must, necessarily, have entirely overlooked the law in regard to the doctrine of last clear chance, which we will touch upon later and which we should properly touch upon here. But we feel that we are imposing upon the time of this Court, in making an Ossa-Pelion task out of what is, in reality, simplicity itself. So we do apologize and will try to call attention, on oral argument, to the fact that, except we indulge in anticipating what the evidence in this case may be, virtually all that has gone before, may be passed over by him who writes the opinion in this case. For it takes no ghost come from the grave to teach us that he who injures another by his negligence, is liable in damages. This complaint alleges that, as against all appellees. Therefore the general demurrer should not have been sustained.

We come now to the particular point on which counsel for all parties devoted their major efforts on oral argument in the District Court, namely,—What was the legal status of the appellant on the premises generally, and particularly at the boiler, at the time of injury? Was he an invitee, a licensee or a trespasser?

Let us treat first, as to the premises generally, and then discuss appellant's status at the boiler where he was hurt.

APPELLANT'S STATUS ON PREMISES, GENERALLY.

The complaint charges that he was an invitee. In paragraph IX of the complaint, we find these words

> "* * * and that the defendants did, during all such times, and in order to and for the purpose of having men readily available to fill the places of any of defendants' employees who might quit their employment, and for the further purpose of having men readily available, for any new work on said dam which might at any time be commenced, encourage and invite said men, including this plaintiff, to wait and remain and spend their time about said premises, and did often furnish or cause to be furnished to such men, including this plaintiff, food, in order that such sojourning, waiting and remaining about said premises might continue." (Tr. p. 12.)

Again in paragraph XII of the complaint (Tr. p. 14) we find the allegation that on the 4th day of August, A. D. 1931, "this defendant, Six Companies,

Incorporated," expressly invited plaintiff to remain about the premises, naming the persons who gave, and the substance of the wording of such invitation. And the last sentence of that same paragraph XII of the complaint also charges that "these defendants, Andersons" did also invite plaintiff to wait about said camps and did furnish him food in order to enable him to do so.

Thus we see that, as to the premises generally, the question is settled by direct averments of the pleading here under fire. And were it not so settled by direct averment, the earlier charges in the complaint, by way of inducement, identifying the defendants and the size and character of the work by them done, the great publicity given to it, unusual desire for work of many men out of employment by reason of world wide industrial depression, and calling attention to the large turnover of workmen at Hoover Dam, appearing previous to that portion of paragraph XII above quoted, would, in our minds, constitute quite sufficient charges on which to base an implied invitation to the premises generally. But our opponents dispute not this. So we pass to the question of appellant's status at the boiler.

APPELLANT'S STATUS AT THE BOILER.

It is urged, and we admit it to be the law, that when one who is invited to a particular portion of certain premises for business purposes, steps aside and goes to another portion of the premises, not included within the invitation, for purposes of his own, in no way

connected with the purpose of his visit or the business in hand, he loses his status as an invitee at such last named place. So that, as hinted before, our task is not so much in finding the law as in applying what we find.

Counsel for appellee, Six Companies, Inc., cited to the District Court on these demurrers, a note in 14 *L. R. A.* (N. S.) 1119. And the strongest case in their favor, there cited, is the case of *Glaser v. Rothschild,* 106 Mo. App. 418, 80 S. W. 332. The facts in that case were that the defendant was the owner of a large wholesale business in the city of St. Louis, conducted in a building owned by himself. He invited plaintiff to call on him at his office in that building to discuss certain bonds or other securities with which plaintiff was familiar and which defendant contemplated buying. Defendant was opening his morning's mail and requested plaintiff to be seated. While thus waiting the pleasure of defendant, plaintiff, to answer a call of nature, requested permission to go to a toilet in the basement of the building, and it, with a key to said toilet, was given plaintiff. In the darkness of the basement, plaintiff fell and was injured while going to said toilet. The Court of Appeals of St. Louis, consisting of three justices, decided in 1904 (106 Mo. App. 418, 80 S. W. 332) that plaintiff, though an invitee at the office was but a licensee as to said basement. But, as pointed out by ourselves, the case did not end there. It reached the Supreme Court in 1909 and was argued and submitted in Division 1 thereof, consisting of four justices, the presiding Judge, Henry Lamm, and associate justices, W. W. Graves,

A. M. Woodsen and Leroy B. Valiant (who was also Chief Justice of the Court). This Division was equally divided on whether Mr. Glaser, the plaintiff, was an invitee or licensee at the time of the injury. The case was then transferred to banc, and the decision of the lower Court in favor of the defendant was reversed, the majority of the whole Court voting that plaintiff was an invitee at the time of the accident. This Supreme Court decision is reported in 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cases 576. We firmly believe that the reasoning of the Supreme Court is the better reasoning and more nearly comports with the modern trend of thought. What was there said could well be said in the case at bar. We quote briefly from that opinion:

> "Hence, obviously, the ensuing wait on the premises may be referred solely to the business on hand and defendant's convenience. It will not do for defendant to finesse and juggle with the situation thus presented, and, by overrefinement, split it into independent parts. * * * It follows that the visit to the store, the wait, and the visit to the water closet are elements of a single and inseparable transaction, colored by a common and dominating purpose; and, such being the case, the law steps in and puts its reasonable construction on what happened, in the light of the civilities of civilized life."

But how much stronger is the case at bar? Our invitation, regard it express or implied, was not to an office alone, but to the premises generally. All through the complaint, the thought of invitation to any particular portion of the premises of defendants is nega-

tived. We mention the camps and works in general terms. (See paragraph V of the complaint, Tr. p. 9; paragraph VI, Tr. p. 10, "some in said Black Canyon, some at Boulder City near said Black Canyon, and some at other places in the vicinity of said canyon and dam"; paragraph VII, Tr. p. 11; paragraph VIII, Tr. p. 11; and particularly first portion of paragraph IX, Tr. p. 12, where it is said that many men came from all parts of the nation to seek work on said dam and "for such purpose did wait, and remain and spend their time about the camps and works of these defendants * * * and did sleep of nights upon the porches and about the buildings and on the desert in close proximity to the camps, bunk houses and other buildings and works of the defendants".) And where do we allege that we were invited? The last part of paragraph IX, Tr. p. 12, plainly says, "about said premises" and says so twice, and in paragraph XII, Tr. p. 14, alleges that appellee, Six Companies, Inc. invited us "to remain about said operations and said camps" and (Tr. p. 15) that appellees, Andersons, invited us "to wait and remain about said camps." Now where was the boiler in question? Was it far removed from "said premises"? Paragraph XI of the complaint, Tr. p. 13, says it was "some few hundred feet from their main dormitory or bunk houses at said Boulder City and adjacent to their main commissary or mess house at said Boulder City" —not, as we suggest, both seriously and in fun, a bad place for a hungry man to "stick around," nor yet an unlikely place in which appellees might expect him to stick. And what relation did the camps at Boulder

City bear to the whole project? In paragraph X near the top of page 13 of the printed transcript, it is said that "a place known as Boulder City" is the main construction camp for said project, and is distant from Las Vegas about twenty-four miles and that most of said waiting men, including the plaintiff, had no other means of reaching said project, camps and works, other than to walk thereto from Las Vegas. So, unlike the *Glaser* case, there cannot be, by any fair construction of this pleading, any question as to our being in a place to which we were not invited, at the time of the accident.

We also called the District Court's attention, and we likewise call the attention of this Court, to the case of

Brigman v. Fiske-Carter Const. Co., 192 N. C. 791, 136 S. E. 125, 49 A. L. R. 773.

Lucy Brigman, the wife of W. B. Brigman, a carpenter, accompanied her husband and minor son, in the family automobile, to the bleaching plant of the defendant, in response to a statement previously made to the husband by the superintendent of the plant, that he, Brigman, might get a job or that there might be an opening in two or three weeks. The wife and son remained in the automobile, after reaching the plant, waiting for Mr. Brigman to go and find said superintendent. After Mr. Brigman had thus left, one of defendant's employees backed a truck into plaintiff's automobile, severely injuring Lucy Brigman's ankle. The defendant contended that Lucy Brigman was a trespasser or, at best, a mere permissive licensee and relied upon the principle of

law announced in the case of *Sweeny v. Old Colony & N. R. Co.,* 10 Allen 368, 87 Am. Dec. 644 (very often cited in the books). Sustaining plaintiff's claim in the *Brigman* case, the Court holds that the husband was an express invitee—there to seek employment, and even goes so far as to say concerning the wife:

> "In truth, the plaintiff's presence upon the premises of defendant was the result of the principle of implied invitation. Her status was that of implied invitee."

In overruling the general demurrer of the appellee, Six Companies, Inc., the District Court undoubtedly was satisfied that appellant was at the boiler at the invitation of said Six Companies, Inc. But the Court might have felt (though we cannot see how) that appellant was not there invited by appellees, Andersons, or if so invited, was not injured by their neglect. As we have said before, our use of the plural in our allegations throughout the whole pleading, makes it difficult to understand exactly what the lower Court had in mind. Was it the thought that Six Companies, Inc. is the major actor? Was it the thought that the Andersons had no hand in this great project—the building of the dam? That forces us to further investigate this complaint, and apply well settled law.

The complaint alleges, paragraph IV, Tr. p. 9, that the appellees, H. S. Anderson and W. S. Anderson, were and are engaged in the business of housing and feeding the employees of appellee, Six Companies, Inc. on said project under a contract with said Six Companies, Inc. by the terms of which said Six Companies, Inc. promises to and does deduct from each

pay check issued by it to each employee for labor, a certain stipulated sum or sums which it agrees to and does pay over unto said Andersons for such housing and feeding, and

> "that all the buildings, fixtures and appliances, necessary and requisite thereto were and are built, furnished, maintained, and operated, exclusively by these defendants, including the boiler hereinafter mentioned."

And what was said boiler used for? And by whom installed and operated? Paragraph XI of the complaint (Tr. p. 13) alleges that it was installed by "these defendants," "for and in connection with said commissary and for other uses and purposes in and about and in connection with the construction work on said dam," and in the same paragraph, at the top of page 14 of the printed transcript, it is said: "these defendants were operating and maintaining said boiler and generating steam therein, for said uses," and in paragraph XV (Tr. p. 16) it is alleged that said boiler "was in the exclusive possession and under the exclusive control and management of these defendants," almost sufficient to call upon defendants to explain the happening of the accident under the *res ipsa loquitur* rule.

The above allegations rivet these appellees together quite strongly. And we believe the evidence will do so likewise. There was then, indeed a community of interest and purpose in the housing and feeding of said employees, if not in all the other aspects of the project. And, as we said before, the more men to employ, the more men to feed and house. Hence a direct benefit to all appellees to maintain a large force

of men. See the reasoning of the Eighth Circuit Court of Appeals, in

Foster v. Portland Gold Min. Co., 114 Fed. 613, particularly on page 615 thereof.

What then, was the duty of all these appellees?

> "When one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."
>
> *Bennett v. Louisville & Nashville R. R. Co.,* 102 U. S. 577, 6 L. Ed. 235 (decided on demurrer to plaintiff's complaint).

To the same effect see:

Cooley on Torts (4th Ed.), Sec. 440 (and long list of cases there cited);

Sweeny v. Old Colony & N. R. Co., 10 Allen 368, 87 Am. Dec. 644.

It will be noted that the United States Supreme Court, in the *Bennett* case, quotes verbatim the text from the eminent juris and writer, Mr. Cooley, which we have set forth above in quotation from the *Bennett* case, and which quotation we have very frequently seen in many other federal and state decisions. The *Sweeny* case is also cited in the *Bennett* decision and it too, appears very frequently in many other cases, federal and state.

See also:

New York Lubricating Oil Co. v. Pusey, 211 Fed. 622 (C. C. A. (2) 1914).

And if the visit to the premises is of joint interest to the proprietor of the premises and the person visiting, such last named person is an invitee by implication, in the absence of an express invitation.

45 *Corpus Juris,* p. 812, Sec. 221;

Bennett v. Louisville & Nashville R. Co., 102 U. S. 577, 6 L. Ed. 235;

Fleischmann Malting Co. v. Mrkacek, 14 F. (2d) 602;

Middleton v. Ross, 213 Fed. 6, 129 C. C. A. 622;

1 *Thompson on Negligence,* Sec. 968-972;

17 *R. C. L.,* p. 566;

Bush v. Weed Lumber Co., 63 Cal. App. 426, 218 Pac. 618;

Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. R. 463;

Pompino v. New York, N. H. & H. Ry. Co., 66 Conn. 528, 34 Atl. 491, 50 A. S. R. 124, 32 L. R. A. 530.

If there can possibly be any question as to our status,—invitee, licensee or trespasser,—let the Court consider well the language of the United States Supreme Court in the *Bennett* case, supra:

> " 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.' "

It may be argued against us that there was a common interest in having appellant on the premises generally, but that there was no interest of any of the

appellees furthered by his presence at the boiler. We have already seen that the boiler was part of the premises, generally. And we are continually going beyond the allegations of the complaint, simply to show that there would be a liability here, were the complaint less certain than it is, on the question of appellant's status. So we will meet appellees on this new ground, though it is unnecessary so to do.

> "The duty to keep premises safe for invitees does not necessarily apply to the entire premises. It extends to all portions of the premises which are included within the invitation and which it is necessary or convenient for the invitee to visit or use in the course of the business for which the invitation was extended, and *at which his presence should therefore reasonably be anticipated, or to which he is allowed to go.*"
>
> 45 *Corpus Juris,* p. 830, Sec. 240.

The appellant strenuously maintains that the present argument which might be appropriate at trial under certain conditions of evidence, has no place here, on a ruling on demurrer to this complaint which contains allegations of express invitation to the place where plaintiff sustained injury. But, as was done in the Court below, we will cite a few cases on this feature of the law.

We have investigated the cases cited in the above quoted text, also those cited in *Cooley on Torts* (4th Ed.), Sec. 440, pp. 192 and 193, as well as many cases under the key number, "Negligence 32 (2)" and "Negligence 32 (3)" in the digest system, and while it is difficult to find a case, the facts of which are parallel

to this, there seems to us no difficulty in applying the law. And we most respectfully point to the fact that practically all this law, excepting the case of *Bennett v. Louisville and N. R. R. Co.,* supra, has been determined on evidence adduced at trial, not on demurrer to a pleading.

Among the cases holding that plaintiff was at a place, comprehended by his invitation, may be cited the following:

Mideastern Contracting Corp. v. O'Toole, 55 F. (2d) 909 (C. C. A. 2, 1932);

Ellsworth v. Metheney, 104 Fed. 119 (C. C. A. 6, 1900);

Ellington v. Ricks, 179 N. C. 686, 102 S. E. 510;

True v. Meredith Creamery, 72 N. H. 154, 55 Atl. 893;

Hupfer v. National Distilling Co., 114 Wis. 279, 90 N. W. 191;

Chicas v. Foley Bros. Grocery Co., 73 Mont. 575, 236 Pac. 361;

Driscoll v. Devenere, 110 Wash. 307, 188 Pac. 408;

Klugherz v. Railway, 90 Minn. 17, 95 N. W. 586, 101 Am. St. Rep. 384.

And among those holding that plaintiff was not an invitee at the place where injured, may be cited:

Rhode v. Duff, 208 Fed. 115 (C. C. A. 8, 1913);

Bush v. Weed Lumber Co., 63 Cal. A. 426, 218 Pac. 618;

Southwest Cotton Co. v. Pope, 25 Ariz. 364, 218 Pac. 152;

Holbrook v. Aldrich, 168 Mass. 15, 46 N. E. 115, 60 A. S. R. 364, 36 L. R. A. 493;

Watson v. Manitou & Pikes Peak Ry. Co., 41 Colo. 138, 92 Pac. 17;

State Compensation Insurance Fund v. Allen, 285 Pac. 1053 (Calif., 1930);

Peebles v. Exchange Bldg. Co., 15 F. (2d) 335 (C. C. A. 6, 1926);

Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33.

In the case of

Baltimore and Ohio R. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186, 119 Am. St. R. 503,

an appeal by the railroad company following trial, brought into question the ruling of the trial Court in overruling a demurrer to the complaint. We invite attention to this case both for the views expressed on a complaint, to our minds more open to attack than the one at bar, and for expressions concerning the above general principles of law as to invitation.

We have observed that there is liability for injury sustained while in a place where one's presence should reasonably be anticipated, or to which he is allowed to go. Even in the absence of an averment of express invitation, which is here present, we respectfully submit that it might reasonably be anticipated that men sleeping on the porches of the bunk houses and about the buildings and on the desert in close proximity thereto (Tr. pp. 12, 15) would go to an uninclosed boiler to dry their clothes from a drenching rain, unless we might suppose that the allegation in paragraph VIII of the complaint (Tr. p. 11) that the temperature where men were employed and kept often

exceeded 120 degrees Fahrenheit, would suggest that wet clothes were to be desired under such conditions. Even so, the Court in Nevada must take judicial notice of the fact that there is a wide variation in temperature, on the desert, night and day, and that when severe desert storms occur, even in summer, they are accompanied by sharp drop in temperature.

23 *Corpus Juris,* pp. 140, 141, 142.

We hardly suspect that the trial judge, well acquainted with Nevada, went so far in his reasoning, as to raise the point here and now first adverted to in this case.

Again, the complaint alleges directly (Paragraph XIV, Tr. p. 16) that permission to go to the boiler was given by "these defendants." So that we come again within the rule.

At this point it might be remarked that counsel for appellees, Andersons, stressed in oral argument to the lower Court on general demurrer, the case of *State Compensation Insurance Fund v. Allen,* 285 Pac. 1053 (cited above) to show that appellant here was not an invitee at the boiler. The facts in that case were that defendant was a general contractor engaged in constructing Union Safe Deposit Bank building in Stockton, California. The intervener, Victor Peterson, who got hurt, was an employee of a sub-contractor. The area about the building reserved for sidewalk, had been excavated to be used as an extension of the basement and over this the contractor had constructed a runway, the night before the accident, made of four 2 x 10 planks, 14 feet in length, for the purpose of conveying a 700 pound

circular steel saw into the building. After the saw was in, two or three of these planks had been removed and Peterson was hurt while trying to enter the building on the one or two remaining planks, and while carrying some heavy block and tackle. The plank on which he was walking gave way. On appeal from a judgment for defendant following the verdict of a jury, the Court affirmed the judgment and rightly held that the jury's decision as to the status of Peterson, ought not to be disturbed. We have no quarrel with that case but we say again here, as we said below, that counsel for appellees, Andersons, omit one vital point in that case. At the top, left side of page 1057 (285 Pac.) the Appellate Court remarks:

> "Peterson knew why it was constructed. He knew that it was being dismantled. He *did not ask for permission* to use it."

That language is significant. It is used by the Court in its reasoning to reach the conclusion it did reach in that case. How can counsel here, console himself with that decision? It strikes directly against the very point he is trying to make. Appellant in the case at bar did ask permission to go to the boiler and that permission was given him. This appears by paragraph XIV of the complaint (Tr. line 16) as well as the allegation that there then and there were other men so waiting employment, who were also drying their clothing from the heat of the boiler, and whose presence there was known to "these defendants" and to "this plaintiff."

If our opponents desire to split hairs and say that paragraph XIV of the complaint, though alleging "permission" does not allege "invitation," let us refer to the above cited case of *Hupfer v. National Distilling Co.,* 114 Wis. 279, 90 N. W. 191, and quote therefrom as follows:

> "There is a broad difference between a trespasser and a mere licensee: also between a licensee and a mere licensee, as the terms are used in the authorities. A trespasser is a wrong doer,—one who acts in defiance of or regardless of the rights of another. Let that other give permission to do the act, he having no interest therein himself, directly or indirectly, and the trespasser becomes a mere licensee. Add the element of mutual interest or business relation of some kind, with or without the advantage to the owner of the property, and the mere license becomes a license or invitation with a suggestion or assurance of safety according to circumstances."

That opinion then proceeds with illustrations and while the Court hesitates to label the status as that of an invitee, its conclusion as to the law is the same. We care not what name may be applied to our status at the boiler. What we are seeking is redress for an injury sustained. And the above case well illustrates that hair splitting will not defeat us.

We also wish to call especial attention to the case of

> *Sink v. Grand Trunk Western Ry. Co.,* 227 Mich. 21, 198 N. W. 238,

on this "permission" feature of the case, which decision we particularly mentioned in our oral argument in the District Court.

As we did in the Stockton bank building case, we could here analyze each and every decision cited against us. But we will not so burden this Court. Suffice it to say that we question not the law in any of those cases. We do, however, most seriously question the manner in which the application thereof is sought to be made. While most of them deny liability, we could safely cite every one (and we have cited most of them) in support of our contention. If any new ones are cited against us, we will attempt to meet them when they come. Until then we feel perfectly safe in what has already been said on this feature of the case, and are quite willing to submit to the sound judgment of this Court, bearing in mind that there might have been some self interest, as indeed there was, on the part of appellees, in permitting appellant and others at the boiler to encourage their waiting about the premises for work.

Some attention was given in the District Court, by these appellees, to the distinction between active and passive negligence, and the claim made that this complaint charges no active negligence. We do not, however, deem it necessary to go into this field of the law, for we respectfully submit that this complaint directly charges active negligence in the installation and operation of this boiler. (Tr. pp. 19, 20, 21, 22.) Moreover, as we pointed out earlier in this brief, regardless of plaintiff's status at the boiler, there was a duty owing to him after knowledge of his position of danger, which may be breached either by active conduct or by omission to act. And evidently the District Court did not take seriously this claim as to lack of

active negligence, when overruling the general demurrer of appellee, Six Companies, Inc. We therefore dismiss the thought.

Earlier herein we said we would touch upon the Last Clear Chance doctrine. We have already called attention to a very similar proposition of law, found in the books under a different heading:

> "Where a trespasser is actually discovered in a position or situation of peril, there is a duty to exercise ordinary care to avoid injuring him, which duty may be breached either by active conduct or by omission to act."
>
> 45 *Corpus Juris,* p. 749, Sec. 145.

We will try to be brief. The Last Clear Chance doctrine, or the Humanitarian Doctrine, as it is sometimes called, is thus stated in a standard text:

> "It is well established, in practically every jurisdiction, that there may be a recovery for injuries sustained, notwithstanding plaintiff, or one for whose conduct plaintiff is responsible, negligently exposed himself or his property to the danger from which the injury complained of arose, if defendant failed to exercise ordinary care to avoid the injury after becoming aware that the person or property was in a position of peril."
>
> 45 *Corpus Juris,* p. 984, Sec. 539.

In *Chunn v. City & Suburban Ry.,* 207 U. S. 302, 309, 28 S. Ct. 63, 52 L. Ed. 219, the Supreme Court of the United States spoke these words:

> "The plaintiff, therefore, was not a trespasser nor a mere traveler upon the highway. It is not

important to determine whether she had become a passenger. * * * The defendant owed her an affirmative duty. It was bound to use that care for her protection which was reasonably required in view of the situation in which she had, at the defendant's invitation, placed herself, of the purpose for which she was there, of the approach of the car which she was intending to enter, and of the danger to be apprehended from contact with a rapidly moving car, propelled by mechanical power. A jury might well say that, under such circumstances, reasonable care demanded the exercise of the utmost vigilance, foresight and precaution.

* * * * * * *

Nor is it clear that, even if the plaintiff was not free from fault, her negligence was the proximate cause of the injury. If she carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury."

The allegations of the pleading in the instant case, calling into being this rule, if such be necessary, will presently be pointed out.

And in the case where this doctrine was first announced, *Davies v. Mann,* 10 M. & W. 546, 152 Reprint 588, 19 E. R. C. 190, Lord Abinger, in the Exchequer, where the case was reviewed, said:

"Even if this ass was a trespasser, and the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for

> the consequences of his negligence, though the animal may have been improperly there."

In *Grand Trunk R. Co. v. Ives,* 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, the rule is stated thus:

> "The contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

Hundreds of cases supporting this doctrine could be cited. We see no need. We submit this rule to meet any possible claim by appellees that appellant himself was guilty of negligence contributing to his injury. For strictly speaking, the rule itself, presupposes negligence on the part of the plaintiff.

45 *Corpus Juris,* p. 988, Sec. 539.

So that it must be clear that this complaint states a cause of action, either way, with or without negligence on the part of appellant. For it clearly alleges that he was in a position of danger, that that danger was unknown to him but was known to "these defendants" (the complaint does not single out the defendant, Six Companies, Inc.) and that "these defendants" failed to warn him and that injury followed by such failure and the negligence of "these defendants." (Tr. pp. 16, 17, 19, 21, 22.) We are at a complete loss to understand how it can possibly be maintained that this pleading states a cause of action against one tort-feasor and not the others. It seems to us too plain for argument that if it fails as to one, it must fail as to all and conversely that if it is good

as against one, it is good as against all. We are perfectly willing to admit that certain assumptions as to what appellant's evidence will be, might call to the foreground, some of the principles of law herein touched upon, which we feel have little place in the ruling on this demurrer. And were we now opposing a motion for nonsuit or directed verdict, instead of a demurrer to a declaration, we would still be compelled to call the Court's attention to a rule, so elementary as hardly to require the citation of authority, that the question of negligence is generally a question of fact to be submitted to a jury and very, very rarely one of law to be decided by a Court as a matter of law.

> "It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."
>
> *Grand Trunk R. Co. v. Ives,* 144 U. S. 408, 21 S. Ct. 679, 36 L. Ed. 485.

To the same effect, see:

Chr. Henrich Brewing Co. v. McGavin, 16 F. (2d) 334, at left bottom p. 336;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720 (Mch. 1930);

Chamberlain v. Pennsylvania R. Co., 59 F. (2d) 986 (C. C. A. 2);

20 *R. C. L.,* p. 169, Sec. 141.

And the rule is the same whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them.

Richmond & Danville R. R. Co. v. Powers, 149 U. S. 43, 45, 13 S. Ct. 748, 37 L. Ed. 642, 643;

45 *Corpus Juris,* pp. 128, 129, Sec. 855;

Williams Estate Co. v. Nevada Wonder Mining Co., 45 Nev. 25, 196 Pac. 844, 848.

And this Court, which we now address, has several times in the past few years, applied the rule relative to the quantum of evidence necessary to sustain a verdict, quite liberally in war risk insurance cases, and more liberally than we would be required to ask, were this question presented after a trial on the merits.

Sorvik v. United States, 52 F. (2d) 406, 410;
United States v. Lawson, 50 F. (2d) 646, 651.

Touching upon this question of province of Court and jury, in a case where plaintiff's status was the main issue, the New Jersey Court held in a case where a woman entered a general store with a vague purpose of buying something if she saw anything that took her fancy, and, while there was nothing to invite her back of counters, generally, there was a passageway through or between two counters, on the wall back of which was a book rack consisting of five shelves, one above the other and about four feet long, filled with books with their titles displayed for selection and a sign above the rack that any book could be bought for ten cents, and where in looking over this list of books, she stepped a little to one side and because of poor light, fell down a stairway back of the counter, that while none of the facts going to make up these conditions were disputed, nevertheless

the deduction to be drawn from them was a question of fact which the trial Court properly submitted to a jury.

MacDonough v. F. W. Woolworth Co., 91 N. J. Law 677, 103 At. 74.

To recapitulate, the question in the case is whether or not there was a duty owing to appellant by these appellees, which was breached by them. Such, as we all know, is the basis of the law of negligence. But the weakness of the position taken by appellees is that they, in trying to solve this question, attempt to anticipate what our evidence may possibly be. A demurrer, we hold, should be determined on what is in a complaint, not on what may be in the evidence adduced at trial. We are not at all fearful of the evidence in this case, but as yet this Court is not concerned with it. The complaint alleges a duty on the part of "these defendants" and its breach by "these defendants." So that the pleading must stand or fall, against all the same as against one.

A complaint alleging that plaintiff was at a place where the accident occurred on business with, and at the invitation of, defendant, is sufficient to show defendant's duty, as between the parties, to keep the premises in safe condition.

Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 257.

In a case reversing the judgment of the District Court based upon the sustaining of a demurrer to plaintiff's complaint, the Circuit Court of Appeals, Sixth Circuit (1930) said:

> "If sufficient averments are not lacking, demurrer will not lie because they may somewhat reflect the difficulty plaintiff may encounter in proving his case."
>
> *Martin v. Pennsylvania R. Co.,* 37 F. (2d) 892, 893.

And in that same case, the Court also said:

> "There is also a question, if it should become material, whether the point where decedent met his death was upon the premises of defendant at the shanty (watchman's shanty at intersection of railroad with village street) or at a place near the shanty made public by a long-continued and tolerated custom of employees to gather there."

The opinion in the above case points out certain defects as to uncertainty in that pleading, not present in the complaint here in question. But as to its general averments, the Court held that under Ohio General Code Sec. 11345, requiring pleadings to be liberally construed with a view to substantial justice there was stated a sufficient cause of action upon the principle that one who invites another to come upon his premises, especially in connection with a matter of interest to one or both parties, owes the invitee the duty to exercise ordinary care to keep the premises reasonably safe for the purpose of the visit and to abstain from any act which might endanger his safety. Plaintiff's intestate, in the case, was killed by derailment of train at or near said shanty.

In concluding, we might call this Court's attention (though we hardly deem it necessary) to the fact that Nevada has a statute exactly similar to the Ohio

statute mentioned in the *Martin* case. It is Section 8621, Nevada Compiled Laws, 1929, and reads as follows:

> "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

At no time has there been any doubt in our minds as to the legal sufficiency of this complaint. We are not saying that it could not be improved. It may be "prolix" and it may be "beclouded," as was said in the *Martin* case. But we do say that it states a cause of action and that we should not be required to plead all our evidence. We have already pleaded more than we were taught to plead, thanks to the modern trend toward loose pleading. But after considerable deliberation, we are more strongly than before, of the opinion that the complaint in the case at bar is not vulnerable to a general demurrer by any or all of these appellees. And the final determination of this question we now, most respectfully submit to the sound judgment of this Court.

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2. THE SECOND SPECIFICATION OF ERROR.

The special demurrer of the appellee, Six Companies, Inc., was sustained on the ground of uncertainty, ambiguity and unintelligibility, in

> "(c) That it cannot be determined from said complaint which of the defendants gave the plaintiff permission to go to said boiler to dry his clothes from the heat of said boiler as stated in Paragraph 14 of said complaint." (Tr. pp. 31, 27.)

As we view the situation, this matter requires little comment. We shall attempt short disposition of it. This Court knows full well that in most jurisdictions such objection is taken by motion to make more definite and certain, when uncertainty or ambiguity actually exist. (Bliss on Code Pleading, 3rd Ed. Secs. 415, 425.) But in Nevada, as in California, the statute provides that the defendant may demur to the complaint, when it appears upon the face thereof,

> "7. That the complaint is ambiguous, unintelligible, or uncertain."
>
> Nevada Compiled Laws 1929, Section 8596;
> California Code Civ. Proc., Section 430.

In the absence of such a statute, the rule is that a demurrer for uncertainty will lie only where the pleading is so indefinite and uncertain as entirely to fail to state a cause of action.

> *Renihan v. Piowaty,* 179 N. E. 568 (Ind. App. 1932);
>
> *J. W. McWilliams Co. v. Travers,* 118 So. 54 (Florida, 1928).

But we are not concerned with the above rule. What is the rule where a special demurrer is provided for by statute? We have been cited to no decision to support the view that this allegation of our complaint is open to the attack made upon it. And, as we view the law, and the English language, we do not contemplate that such decision ever will be brought to our attention.

The rule is stated in California Jurisprudence as follows:

"The word 'uncertainty' in the code refers to the uncertainty defined by the authorities on pleading (7). Objection on this ground does not cover cases where a complaint is ambiguous (8) or fails to allege sufficient facts (9); it goes rather to a doubt as to what the pleader means by the fact alleged (10). On this ground a demurrer lies to a complaint which does not state the time (11) or place (12) of the several issuable facts averred."

Vol. 21 *Cal. Jurisprudence,* p. 104, Sec. 67;

(7) *Kraner v. Halsey,* 82 Cal. 209, 22 Pac. 1137, citing Gould's Pleading and Stephen's Pleading;

(8) *Kraner v. Halsey* (supra);

(9) *Callahan v. Broderick,* 124 Cal. 80, 56 Pac. 782;

(10) *Callahan v. Broderick* (supra);

(11) *Mattson v. Mattson,* 181 Cal. 44, 183 Pac. 443;

Williamson v. Joyce, 137 Cal. 151, 69 Pac. 980;

Wilhoit v. Cunningham, 87 Cal. 453, 25 Pac. 675;

(12) *Mattson v. Mattson* (supra).

And, as regards ambiguity, the rule is stated thus:

"The term 'ambiguity' signifies 'doubtfulness or uncertainty, particularly of signification; equivocal' (14). No general rule can be laid down by which to determine the exact degree of ambiguity which will be fatal (15). It may be stated, however, that a demurrer on this ground does not lie if enough appears to make a pleading easy of comprehension and free from reasonable doubt. (16)

* * * * * * *

But, because defendant cannot be misled, a demurrer for ambiguity does not lie where the caption of a complaint shows two or more defendants, and through clerical error in the body of the pleading the word 'defendant' (singular number) is used (20). It may be otherwise, however, where such a defect is persistent and runs through the entire pleading (1)."

Vol. 21 *Cal. Jurisprudence,* p. 102, Sec. 66;

(14) *Kraner v. Halsey,* 82 Cal. 209, 22 Pac. 1137;

Nevada County & S. C. Co. v. Kidd, 37 Cal. 282;

(15) *Hawley Bros. etc. Co. v. Brownstone,* 123 Cal. 643, 56 Pac. 468;

(16) *Jones v. Iverson,* 131 Cal. 101, 63 Pac. 135;

Whitehead v. Sweet, 126 Cal. 67, 58 Pac. 376;

Kraner v. Halsey (supra);

Applegarth v. Dean, 68 Cal. 491, 13 Pac. 587;

Salmon v. Wilson, 41 Cal. 595;

Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478;

Hurwitz v. Gross, 5 Cal. App. 614, 91 Pac. 109;

(20) *Fay v. McKeever,* 59 Cal. 307;

(1) *Hawley Bros. etc. Co. v. Brownstone,* 123 Cal. 643, 65 Pac. 468.

The two Nevada decisions cited under the above mentioned Nevada Code section, are:

Burgess v. Helm, 24 Nev. 242, 51 Pac. 1025;

Ferguson v. Virginia & T. R. R. Co., 13 Nev. 184, 187.

We do not believe that this Court will find it necessary to examine all of the above cases. But all, either directly or indirectly, plainly show that the allegation

in paragraph fourteen of this complaint is not vulnerable to the attack made upon it. Were we to single out a few of these cases, we would indicate *Salmon v. Wilson,* 41 Cal. 595; *Callahan v. Broderick,* 124 Cal. 80, 56 Pac. 782; *Fay v. McKeever,* 59 Cal. 307; and *Hawley Bros. Hdw. Co. v. Brownstone,* 123 Cal. 643, 56 Pac. 468.

Elsewhere the California Court has said:

> "Faults consisting in ambiguities and uncertainties should be viewed, to a certain extent, in the light of the situation of the parties as to their knowledge of the facts; that is, as to facts of which the plaintiff cannot, from their nature, have as full information as the defendant, less certainty is required in the allegations of the complaint, partly because a desirable degree of certainty may be impossible, and partly because the facts being known to the defendant, he is not likely to be embarrassed or injured."
>
> *Schaake v. Eagle Automatic Can Co. et al.,* 135 Cal. 472, 63 Pac. 1025, at 1029.

We make this observation because we believe that the appellees are trying to force us to disclose our evidence before trial, and we respectfully submit that this is not the proper manner of so doing.

Suppose, for illustration, that permission was given us to come to the boiler by but one person. Obviously, in that event, our permission did not come from "these defendants," three in number, unless such individual properly represented all three defendants. And suppose that we claim that very thing. Do we have to disclose our proof, simply because such de-

fendants may think it difficult for us to prove our case, as we allege it? If so, that is a new rule to us. Each defendant is amply protected by his right to put such fact in issue by a denial, if he chooses.

> "Besides, when it appears, as it does here, that the matter in respect to which the complaint is uncertain or ambiguous, was peculiarly within the knowledge of the defendant, such uncertainty or ambiguity is not a ground of demurrer of which the defendant can avail himself. Beatty, C. J. in Doe v. Sanger, 78 Cal. 150, 152, 20 Pac. 366."

Dow v. City of Oroville, 22 Cal. App. 215, 134 Pac. 197 at 200;
21 *R. C. L.* p. 486;
49 *C. J.* p. 378.

But we are crossing bridges—we are indulging in assumptions to determine a demurrer. So too, the lower Court must have done. What is the language of the complaint in this particular?

> "And asked permission so to do, of these defendants, which was immediately given him." (Tr. p. 16.)

If we are to indulge in any assumption, in determining this special demurrer, let us indulge in the only one that is fair, under the language of the complaint, and assume that all of the defendants gave us permission to go to the boiler to dry our clothes. What then becomes of the lower Court's ruling? To say that it is impossible that such a fact exist, is not sufficient. The allegation is that the fact exists, and if we are able to prove it at trial, it certainly would

be very wrong and contrary to the original purpose of a pleading, for a Court to step in, on demurrer, and say to us, "You are not allowed to prove such fact against all these defendants. Make your choice; select one and state in your complaint which one you select."

Speaking of probabilities, it might jocularly be said in passing, that it would perhaps seem improbable that the appellee, H. S. Anderson, should make affidavit for the removal of this cause to a Federal Court in October, stating that he was a citizen and resident of California, and in the June following, attend a National political convention as a delegate from Nevada. And while this record does not show the whole fact, the fact exists. We made no attempt to have the case remanded, and make no complaint now in that regard. We are simply trying to apply law and reason, to the matter now before this Court.

We saw in *Fay v. McKeever,* 59 Cal. 307, and *Hawley Bros. etc. Co. v. Brownstone,* 123 Cal. 643, 56 Pac. 468, that there is a clear distinction between the use of the singular, "the defendant," and the plural, "the defendants." Had we alleged that we were given permission to go to the boiler by "some of the defendants" or "certain of the defendants," then these appellees might, with more reason, ask us to designate which particular ones gave that permission.

Indulging again in an assumption, suppose that all three of these defendants, or appellees, gave us permission. Of course, in the case of Six Companies, Inc., a corporation, it could act only through some

natural person. But suppose that person himself directly gave the permission and that H. S. Anderson did so likewise, as did also W. S. Anderson. What then becomes of the lower Court's ruling? Is there a law against our proving such fact? If so, we do not know where to find it. In *Schaake v. Eagle Automatic Can Co.,* 135 Cal. 472, 63 Pac. 1025 at 1027, it is said:

> "Demurrers for ambiguity or uncertainty are in aid of the pleading, and contemplate an amendment in the particulars specified in them."

How could we amend, under the last state of facts? We alleged "these defendants" and we meant that very thing. We know not how to change it without sacrificing a right that is clearly ours.

We respectfully call the Court's attention to the case of

> *Smith v. Hollander,* 85 Cal. A. 535, 259 Pac. 958,

where it is held that uncertainty consists of what is said with an uncertain meaning, and not what is omitted.

And in

> *Callahan v. Broderick,* 124 Cal. 80, 56 Pac. 782,

the same Court said:

> "The objection of uncertainty goes rather to the doubt as to what the pleader means by the fact alleged, not to the failure to allege sufficient facts. When the facts alleged are insufficient, the pleading is to be tested by general demurrer."

We have said nothing to meet the charge of "unintelligibility" directed against paragraph fourteen of the complaint. And we believe we have given it exactly the consideration which it deserves.

In *Harvey v. Meigs,* 17 Cal. App. 353, 119 Pac. 941 at 944, in which there was a demurrer for ambiguity, Chief Justice Chipman said:

> "I desire to add that where a plaintiff is sent out of court on his pleading, without a hearing on the merits of his case, the adversary party should support the grounds of his assault and not throw all responsibility upon the appellate court unaided."

No brief was filed by the respondents in that case. We trust that the appellees here will not follow that lead and throw upon this Court the burden of showing wherein we have misinterpreted the law on these demurrers. And as to the special demurrers, we feel that their task will indeed be great. And reiterating what has been said before, should this Court not hold with us as to our status at the boiler, we believe that the appellees will find some difficulty in overcoming the allegations that appellant was in a position of danger, that that danger was known to appellees and unknown to appellant, and that they failed to warn appellant, (Tr. pp. 17, 19, 21) and that injury resulted by their act.

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3. THE THIRD SPECIFICATION OF ERROR.

This specification of error, "That the Court erred in entering final judgment in favor of the defendants"

(Tr. p. 37), follows as a natural, logical and peremptory conclusion to a decision in appellant's favor upon the other two specifications of error, and hence needs no argument.

We most respectfully submit that the judgment of the District Court should be reversed, with an order that the general demurrer of the appellees, H. S. Anderson and W. S. Anderson, and the special demurrer of the appellee, Six Companies, Inc., be overruled, to the end that said appellees may file their answers to said complaint, and the case proceed to trial on its merits.

Dated, Las Vegas, Nevada,
November 14, 1932.

Respectfully submitted,
ALBERT DUFFILL,
HARRY H. AUSTIN,
Attorneys for Appellant.

No. 6945

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEONARD R. KING,
(Plaintiff) Appellant,

vs.

SIX COMPANIES, INC. (a corporation), and H. S. ANDERSON and W. S. ANDERSON, copartners, doing business under the firm name and style of Anderson Boarding and Supply Company,
(Defendants) Appellees.

BRIEF FOR APPELLEES

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Topical Index.

Authorities and Cases Cited

No. 6945

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(Defendants) Appellees.

BRIEF FOR APPELLEES

STATEMENT OF FACTS.

The appellee, Six Companies Incorporated, is the general contractor for the construction of the Hoover Dam, popularly known as the Boulder Dam, for the United States Government. (Tr. pp. 8, 9.)

The appellees, H. S. Anderson and W. S. Anderson, copartners doing business under the firm name of Anderson Boarding and Supply Company, are sub-

contractors in connection with boarding and lodging employees at said project. (Tr. p. 9.)

The appellant, Leonard A. King, while seeking employment at said project in the summer of 1931, resorted to a boiler on said premises to dry his clothes and was injured when the boiler exploded. In his complaint he sought damages for $10,333.50. (Tr. p. 25.)

The District Court sustained a special demurrer of the defendant corporation, and a general demurrer of the defendant copartners, and plaintiff having failed to amend, judgment was entered in favor of such defendants. (Tr. pp. 32, 33.)

The present brief is filed jointly by the defendants as appellees.

STATEMENT OF ISSUES.

The brief for appellant is unusually prolix in view of the simple questions involved, and the appellees feel that no useful purpose can be served by answering the various arguments with minuteness of detail or by minutely distinguishing the various citations of appellant. For the purpose of brevity a simple independent presentation has been adopted.

Appellant seeks to restrict the scope of the review on appeal (Bf. App. p. 3), but is under a misconception as to the proper scope of such review. It is the general rule, of course, that in reviewing

an order sustaining a demurrer an appellate court is not restricted to the grounds upon which the action of the lower court is bottomed, but is free to consider each specified ground of demurrer, and if the demurrer was well taken on any ground the judgment below must be affirmed. (1 *Bancroft's Code Pleading,* p. 219; 4 *Corpus Juris,* p. 1132; *Burke v. Maguire,* 154 Cal. 456, 461; *Davie v. Board of Regents,* 66 Cal. App. 693, 702.)

In the present case, therefore, the defendants are entitled to a consideration of each ground of their respective demurrers, and the appellant cannot restrict the review by merely selecting such grounds of demurrer as he chooses to argue. Hence the questions on this appeal become the following:

(1) Was the complaint vulnerable to general demurrer?

(2) Was the complaint vulnerable to the special demurrer?

ARGUMENT.

(1)

THE COMPLAINT WAS VULNERABLE TO GENERAL DEMURRER FOR THE REASON THAT IT FAILED TO STATE A CAUSE OF ACTION AGAINST THE DEFENDANTS OR ANY DEFENDANT.

The first essential inquiry consists in determining the status of the plaintiff at the time he was injured. If the pleaded facts establish his status as that of invitee, then the complaint states a cause of action; but

if the pleaded facts establish his status as that of licensee, then the complaint does not state a cause of action.

It is undeniable that *to an invitee* the defendants would owe the duty of ordinary care and would be legally responsible for negligence in such respect. And it is equally certain that *to a licensee* the defendants would merely owe the duty of refraining from wantonly or wilfully injuring him, and would not be legally responsible for the acts or omissions charged in the complaint. It is true that paragraphs XIX and XX of the complaint under review (Tr. pp. 18-20) purport to state the various "duties" of the defendants; but under settled rules of pleading the conclusions of the pleader respecting the "duties" of the defendants must be disregarded in ascertaining their duties at law and in testing the sufficiency of the complaint. (*Whitten v. Nevada Power, Light & Water Co.,* 132 F. 782, 783, 784; 45 *Corpus Juris,* pp. 1061, 1062.)

In ascertaining the duties of the defendants we need not follow the appellant into the discussion as to whether the plaintiff, as a potential employee, was on the premises by invitation. The determinative question must be: *Do the pleaded facts show that he was at the boiler on said premises by the invitation of the defendants?*

The controlling law finds expression in *Peebles v. Exchange Bld. Co.,* 15 F. (2d) 255, 257, where the Circuit Court of Appeals for the Sixth Circuit said:

> "The declarations allege that she was on the defendant's premises by invitation. But this is not sufficient. She must have been where she was when she fell, by such invitation. If in being there she was a licensee or trespasser; no recovery can be had. Licensees must take the premises as they find them. The owner thereof is not bound to care for their safety, otherwise than to refrain from setting a trap for them and other active negligence."

The complaint under review expressly alleged that the plaintiff was injured by an explosion at the boiler (Tr. p. 17), and that plaintiff "went to said boiler to dry his clothes from the heat of said boiler, and asked permission so to do, of these defendants, which was immediately given him." (Tr. p. 16.) And such allegation is manifestly the equivalent of an allegation that plaintiff was a licensee at the boiler when injured.

In *Branan v. Wimsatt,* 298 F. 833, 837, (certiorari denied, memorandum, 265 U. S. 591, 44 S. Ct. 639, 68 L. Ed. 1195), it was said:

> "A permission, whether express or implied, is not an invitation to enter or use, and establishes no higher relation than that of mere licensor and licensee."

In *Herzog v. Hemphill,* 7 Cal. App. 116, 118, 119, in which the opinion was written by Associate Justice Kerrigan, now District Judge Kerrigan, the court said:

> "It is a well-settled rule of law that the owner or occupier of lands or buildings who, by invitation

express or implied, induces persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe, but he assumes no duty to one who is on his premises by permission only and as a mere licensee, except that while on the premises no wanton or willful injury shall be inflicted upon him." (p. 118.)

"Mere permission, or a habit, however, of an owner of allowing people to enter and use a certain portion of his premises is indicative of a license merely, and not an invitation." (p. 119.)

And in *State Compensation Ins. Fund v. Allen,* 104 Cal. App. 400, 410, it was said:

"The doctrine is well established that except for wilful and wanton injury, the owner or one in control of property is not liable for injuries sustained by a mere licensee or trespasser."

At page 409 of the last cited authority the court referred to the fact that the injured person had not asked for "permission", and at page 40 of his brief herein the appellant seizes upon such reference and distorts it into the claim that the *Allen* case is authority for the rule that permission is equivalent to invitation. But appellant was unmindful that the court later on at page 411 cited with approval the following language from *Bottum's Administrator v. Hawks,* 84 Vt. 370, 79 Atl. 858, 864:

"Neither silence, acquiescence, nor permission * * * standing alone, is sufficient to establish an invitation. A license may thus be created, but not an invitation."

In the complaint under review it was not alleged that plaintiff was expressly invited to dry his clothes at the boiler, and the allegations of the complaint destroy any possible claim that plaintiff was impliedly invited in such respect. We have in mind the allegations of paragraph VIII of the complaint (Tr. p. 11) to the effect that the summer of 1931 was unusually hot, that the temperature often exceeded 120 degrees Fahrenheit, that men were overcome with heat and forced to quit their work on account of the heat, and the allegations of paragraph XI of the complaint (Tr. pp. 13, 14) to the effect that the boiler was in operation generating steam. No rational view of such allegations could conclude that an invitation to potential employees to remain "about the camps and operations" of the defendants under conditions of such excessive heat would carry with it the implied invitation to become further over-heated by resorting to a boiler in operation and generating steam. "But when it was made to appear," said the court in *Powers v. Raymond,* 197 Cal. 126, 131, "that the occupancy and use of the portion of the premises on which the plaintiff was injured could not under any rational view of the evidence be within the scope of the invitation she became a mere licensee to whom the defendant owed no duty except to abstain from wilful or wanton injury."

Plainly, the pleaded facts establish beyond controversy that plaintiff occupied the status of licensee at the time he was injured at the boiler.

The next determinative question must be: *Do the pleaded facts show that the defendants were guilty of wilful or wanton injury to the plaintiff?*

The brief for appellant glosses over this question by asserting the following at pages 42 and 43:

> "We do not, however, deem it necessary to go into this field of the law, for we respectfully submit that this complaint directly charges active negligence in the installation and operation of this boiler. (Tr. pp. 19, 20, 21, 22.) * * * We therefore dismiss the thought."

According to the allegations of paragraph XXI of the complaint (Tr. p. 21) the negligence charged existed at the time plaintiff resorted to the boiler, and consisted of acts of omission rather than acts of commission. Thus it was alleged that the boiler was not enclosed from the wind; that it was not provided with a smokestack of sufficient height to insure an ordinary draft of air through the boiler under ordinary conditions; that the amount of fuel was not properly regulated; that the flues were not clean or free from soot and carbon; that the openings in the wall of the fire box were not kept closed; that sufficient draft of air through the fire box to carry off the gases was not provided; and that a competent man was not kept constantly present at and in charge of the boiler.

None of these acts was charged as wilful or wanton, and none of these acts was active negligence. What constitutes active negligence and the law relating

thereto as affecting licensees is copiously annotated in 49 A. L. R. 778.

In *Rhode v. Duff,* 208 F. 115, 117, 118, the Circuit Court of Appeals for the Eighth Circuit said:

> "The court below directed a verdict for the defendant upon the ground that:
>
> 'Mr. Rhode at the time he was in this place of business was there by permission as a licensee, and that the defendant owed no duty to him to change his arrangements in his place of business with regard to this doorway and the location of the water-closet and the lights maintained there. If it was satisfactory to the defendant, it served his purpose, and then the plaintiff was bound to take the place as he found it.'
>
> We think this was a correct statement of the law under the evidence produced, and that there was no error in directing a verdict for the defendant."

And in *Peebles v. Exchange Bld. Co.,* supra, the court said at page 257:

> "Licensees must take the premises as they find them."

Appellant finally resorts to the doctrine of last clear chance and claims that the pleaded facts call for an application of that doctrine. (Bf. App. p. 43, et seq.)

In commenting on the doctrine the court in *Darling v. Pacific Electric Ry. Co.,* 197 Cal. 702, 707, said:

> "The elements of the doctrine of last clear chance, which must be present in any given case in order to warrant the invocation of that doctrine are these: (1) That the plaintiff has been negligent; (2) That as a result thereof she was present in a situation of danger from which she could not escape by the exercise of ordinary care; (3) That the defendant was aware of her dangerous situation and realized, or ought to have realized, her inability to escape therefrom; (4) That the defendant then had a clear chance to avoid injuring her by the exercise of ordinary care; (5) That the defendant failed to avoid the accident by the use of ordinary care."

The insufficiency of the pleading to bring the case within the doctrine is apparent upon the most cursory reading. It will suffice to say, however, that the complaint under review *carefully refrained from alleging that defendants were aware that plaintiff was in a dangerous situation.* It is true that in paragraph XVI (Tr. pp. 16, 17) it was alleged as follows:

> "That plaintiff took a position at the side of said boiler in the lee of the wind * * * and that his said position was a dangerous position, and that the danger thereof was well known to defendants but was unknown to plaintiff."

While the foregoing measures up to an allegation that defendants knew that such position was dangerous, *it falls short of an allegation that defendants were aware that plaintiff was in such position.* And

from paragraph XXIII of the complaint (Tr. p. 22) it affirmatively appears that defendants were not aware that plaintiff was in such position. It was there alleged:

> "That at the time of the injury and for some little time immediately prior thereto, neither of the defendants, onr any employee of any of said defendants were present at said boiler."

There is therefore no room under the complaint in this action for invoking the doctrine of the last clear chance.

It is manifest without further argument that the complaint was vulnerable to general demurrer for the reason that it failed to state a cause of action against the defendants or any defendant, and that the judgment should be affirmed.

---

(2)

THE COMPLAINT WAS VULNERABLE TO SPECIAL DEMURRER ON THE GROUND OF UNCERTAINTY.

It is a familiar rule of pleading that the purpose of a complaint is to inform the opposite party of the *facts* upon which the pleader relies as constituting his action. (*Santa Rosa Bank v. Paxton,* 149 Cal. 195, 197.) That uncertainty is a well established ground of demurrer needs no citation of authority. (*Martin v. Bank of San Jose,* 98 Cal. App. 390, 399.)

The demurrers of the respective defendants appear in the Transcript at pages 26 to 30, and each defendant assigned the following grounds of uncertainty:

> (a) That it could not be ascertained which of the defendants gave plaintiff permission to resort to the boiler.
>
> (b) That it could not be ascertained wherein the position taken by plaintiff at the boiler was dangerous.

(a) The complaint blanketed all defendants under the allegation that they gave plaintiff permission to resort to the boiler. When the lower court held that no cause of action was stated against the defendant copartners, it had no alternative but to sustain this ground of special demurrer as to the defendant corporation. Assuming that permission implies invitation as the lower court must have assumed,—and we deny that such is the law,—it then became necessary to remove the blanket and require the plaintiff to allege that the defendant corporation gave such permission. Manifestly, permission by the defendant copartners would not bind the defendant corporation, and manifestly the complaint was uncertain because it left the inference that such permission may have been given by the defendant copartners only. According to the view adopted by the lower court there was no alternative but to sustain the special demurrer of the defendant corporation on this ground.

(b) The complaint alleged that plaintiff took a "dangerous" position at the side of the boiler. (Tr. pp. 16, 17.) This was merely the conclusion of the pleader, and under settled rules of pleadings defendants were entitled to allegations *of the facts*. Clearly, the complaint was defective in this respect and the demurrers on the ground of uncertainty should have been sustained in such respect.

CONCLUSION.

It is therefore respectfully submitted that the judgment appealed from should be affirmed.

Dated, San Francisco,
January 10, 1933.

HENDERSON & MARSHALL,
Attorneys for Appellees, H. S. Anderson and W. S. Anderson, d. b. a. Anderson Board and Supply Company.

MCNAMEE & MCNAMEE,
REDMAN, ALEXANDER & BACON,
HERBERT CHAMBERLIN,
Attorneys for Appellee, Six Companies, Inc.

No. 6946

United States

Circuit Court of Appeals

For the Ninth Circuit

MINA H. JOHNSON, SIGMUND BEEL and A. G. BRODIE,

Appellants,

vs.

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, WEEPAH HORTON GOLD MINES COMPANY, a Corporation, IVEN T. JEFFRIES, O. U. PRYCE and P. N. PETERSEN,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court for the District of Nevada.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

No. 6946

United States

Circuit Court of Appeals

For the Ninth Circuit

MINA H. JOHNSON, SIGMUND BEEL and A. G. BRODIE,

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Transcript of Record

Upon Appeal from the United States District Court for the District of Nevada.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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THATCHER & WOODBURN, Reno, Nevada,

For the Defendants in Error. [1]*

In the District Court of the United States in and for the District of Nevada.

No. G-223

In Equity

MINA H. JOHNSON, SIGMUND BEEL, and A. G. BRODIE,

Plaintiffs,

vs.

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation, organized and existing under the laws of the State of Nevada,

Defendants.

AMENDED BILL OF COMPLAINT.

To the Judge of the District Court of the United States for the District of Nevada:

Mina H. Johnson, Sigmund Beel, and A. G. Brodie, plaintiffs herein, each of whom is a citizen

*Page numbering appearing at the foot of page of original certified Transcript of Record.

of the State of California, said Mina H. Johnson and said Sigmund Beel residing in the City and County of San Francisco, in said State of California, and said A. G. Brodie residing in the County of Alameda, State of California, pursuant to leave of Court first had and obtained, bring this their amended bill of complaint against F. E. Horton, Frank Horton, Jr., R. McCarthy, and A. F. Price, defendants, who are citizens of the State of Nevada, each of whom resides in the County of Washoe, in said state and defendant Weepah Horton Gold Mines Company, a corporation, duly created and existing under the laws of the State of Nevada, and being a citizen of said state, having its principal place of business at Tonopah, in the County of Nye, in said state, and complain and say: [2]

1. The ground upon which the jurisdiction of this Court depends is diversity of citizenship between the parties hereto, and the amount in controversy herein exceeds $3000.00, exclusive of interest and costs.

2. The plaintiff Mina H. Johnson is a citizen of the State of California and resides in the City and County of San Francisco, in said state.

3. The plaintiff Sigmund Beel is a citizen of the State of California and resides in the City and County of San Francisco, in said state.

4. The plaintiff A. G. Brodie is a citizen of the State of California and resides in the County of Alameda, in said state.

5. The defendant F. E. Horton is a citizen of the State of Nevada and resides in the County of Washoe, in said state.

6. The defendant Frank Horton, Jr., is a citizen of the State of Nevada and resides in the County of Washoe, in said state.

7. The defendant R. McCarthy is a citizen of the State of Nevada and resides in the County of Washoe, in said state.

8. The defendant A. F. Price is a citizen of the State of Nevada and resides in the County of Washoe, in said state.

9. The defendant Weepah Horton Gold Mines Company, a corporation, is a citizen of the State of Nevada, organized under the laws of said state, existing thereunder and having its principal place of business at Tonopah, Nye County, in said state, and owning valuable mining claims in the State of Nevada, whose value is in excess of $3,000.00.

10. The matter in controversy herein, exceeds, [3] exclusive of interest and costs, the sum or value of $3,000.00.

11. A true copy of the by-laws of defendant Weepah Horton Gold Mines Company, as said by-laws were adopted by the stockholders of said corporation on the 23rd day of January, 1929, immediately subsequent to its organization and as the same now exist, with the exception of a purported amendment to Section 4 of Art. 2 thereof, which

purported amendment will be hereinafter referred to, is appended hereto, marked "Exhibit A," and incorporated herein by reference with the same force and effect as if rewritten herein in full.

12. A true copy of the original articles of incorporation of defendant Weepah Horton Gold Mines Company, which have never been amended in any respect whatsoever, is appended hereto, marked "Exhibit B" and incorporated herein by reference with the same force and effect as if rewritten herein in full.

13. No meeting of the stockholders of said corporation, for the purpose of electing directors of said corporation, was held between on or about the 1st day of February, 1929, and the 21st day of March, 1932. For this reason plaintiff Mina H. Johnson, as the duly appointed executrix of the estate of I. H. Johnson, deceased, joined with plaintiff A. G. Brodie and other persons, all of whom are stockholders of record in defendant Weepah Horton Gold Mines Company, in calling a special meeting of the stockholders of said corporation noticed to be held on the 21st day of March, 1932, for the purpose of electing directors in said corporation for the ensuing year and until the election and qualification of their successors in office. A true copy of said call is appended hereto, marked "Exhibit C" and by reference made a part hereof as if rewritten herein in full. At all times [4] herein mentioned the total issued and outstanding capital stock of de-

fendant Weepah Horton Gold Mines Company is and was 1,168,300 shares and said call was signed by stockholders of record in said corporation holding and owning more than one-third of said outstanding stock.

14. At a meeting of the board of directors of said corporation held on the 22nd day of May, 1929, assessment No. 1 was levied on the issued and outstanding capital stock of said corporation.

At a meeting of the board of directors of said defendant corporation held on or about the 15th day of March, 1932, a resolution was adopted which, in substance, provided that so many shares of each parcel of outstanding stock as would be necessary, would be sold at public auction on the 18th day of April, 1932, at the hour of 10:00 o'clock A. M. of said day for the purpose of paying delinquent assessments thereunder and notice thereof has been duly sent to the stockholders of record of said corporation, and advertised as required by law.

At a meeting of the board of directors of said corporation held on the 15th day of March, 1932, which board consisted of defendant F. E. Horton, defendant Frank Horton, Jr., and defendant R. McCarthy, George C. Keough, and A. F. Price, a resolution was adopted, which, in substance, provided that said assessment No. 1 levied on the stock of defendant F. E. Horton in the amount of $3657.50 should be paid by offsetting said amount against bills in the amount of $4242.18 alleged to

have been paid by defendant F. E. Horton for and on account of said corporation.

15. That at a meeting of the board of directors of defendant corporation held on the 19th day of March, 1932, at [5] which all of said five directors were present and acting, to-wit: F. E. Horton, Frank Horton, Jr., R. McCarthy, George E. Keough, and A. F. Price, a resolution was adopted by said directors purporting to change and amend Section 4 of Art. 2 of the by-laws of said corporation by adding the following thereto:

> "No stockholder shall be entitled to vote any shares of stock on which share or shares of stock the or any assessment thereon be due, unpaid, or delinquent, and no shares shall be voted at any meeting of stockholders for the election of directors unless all calls and assessments thereon or against said stock shall be paid on the date and at and prior to the meeting of the shareholders.
>
> "At all meetings of stockholders, in order to constitute a quorum, only shareholders who have paid all calls and assessments theretofore levied, shall be considered as shareholders of the company."

16. From the time of the sending out said call referred to in paragraph thirteen (13) herein and to and including Sunday, March 20, 1932, defendant F. E. Horton conducted a vigorous campaign to secure proxies authorizing him to vote at said stock-

holders' meeting the shares of the capital stock of said corporation owned and held by the various stockholders of said corporation; and in said campaign proxies were sought and secured by him from stockholders in said corporation who had not yet paid their said assessments, as well as from stockholders who had paid their assessments; and efforts were made by said defendant F. E. Horton up to as late as Sunday, March 20, 1932, to secure proxies from persons holding stock in said corporation who had not paid their said assessment thereon.

17. The special stockholders' meeting for the purpose of electing directors of defendant corporation was duly held in accordance with the call and notice hereinbefore re- [6] ferred to at 10:00 o'clock A. M. on the 21st day of March, 1932, at the office of the corporation in Room 13 of the United Nevada Bank Bldg., in Reno, Nevada. There were present at said meeting in person and by proxy 1,136,140 shares of the capital stock of said corporation out of a total of 1,168,300 shares of the capital stock of said corporation issued and outstanding. The proxy committee appointed by the chair consisting of Wm. McKnight, Wm. Forman, Jr., and M. E. Gibson, made a written report to the chair as to the number of shares of stock present at said meeting in person and by proxy, a true copy of which report is appended hereto, marked "Exhibit D" and by reference incorporated herein as if rewritten herein in full.

18. The proxy committee's report having been accepted by the chair, the meeting proceeded in the election of five directors of the corporation to serve for the ensuing year and until the election and qualification of their successors in office. F. E. Horton, Frank Horton, Jr., R. McCarthy, Mina H. Johnson, A. G. Brodie, and Sigmund Beel were duly nominated. The meeting then proceeded in the election of directors by written ballot under the supervision of said Wm. McKnight and said Wm. Forman, Jr., who had been appointed inspectors of election by defendant H. E. Horton, chairman of said meeting. In said election plaintiff Mina H. Johnson, the holder of proxies at said meeting representing 85,500 shares of the capital stock of said corporation and representing in person 167,000 shares of the capital stock of said corporation, cumulated said shares and voted 420,833⅓ shares for each of three of said nominees, to-wit: Mina H. Johnson, A. G. Brodie, and Sigmund Beel; and M. E. Gibson, the holder of proxies at said meeting representing 360,550 shares [7] of the capital stock of said corporation, cumulated said shares and voted 600,916⅔ shares for each of three of said nominees, to-wit: Mina H. Johnson, A. G. Brodie, and Sigmund Beel. The polls being closed, said Wm. McKnight and Wm. Forman, Jr., as said inspectors of election, proceeded to canvass and examine the votes cast and thereupon made their report in writing to the chairman, a true copy of which is an-

nexed hereto, marked "Exhibit E" and by reference incorporated herein as if rewritten herein in full. That upon request being made by said M. E. Gibson of said inspectors as to why the votes cast by Mina H. Johnson and M. E. Gibson for Mina H. Johnson, A. G. Brodie, and Sigmund Beel, as aforesaid, had been disregarded and not counted by said inspectors, with the exception of 142,083⅓ votes for each of said individuals, as shown on said inspectors' report, said inspectors stated in substance that they had not counted and had eliminated from the poll all votes cast in said election representing outstanding stock of record in said corporation on which said assessment No. 1 had not yet been paid. Whereupon the chairman F. E. Horton declared that defendants F. E. Horton, Frank Horton, Jr., and R. McCarthy had been elected directors in said corporation to serve as such until the election and qualification of their successors in office and that owing to the report of the inspectors showing a tie vote between plaintiffs Mina H. Johnson, A. G. Brodie, and Sigmund Beel the remaining two places in the directorate were to be considered as vacant. Whereupon defendant H. E. Horton announced that the meeting was adjourned. M. E. Gibson then stated to the meeting, as it was adjourning, that plaintiffs Mina H. Johnson, A. G. Brodie, and Sigmund Beel, having each received 1,021,750 votes in said election, said plaintiffs [8] Mina H. Johnson, A. G. Brodie, and Sigmund Beel were duly elected

directors of said corporation and that the organization meeting of the board of directors of said corporation would be held in said room immediately after the adjournment of said stockholders' meeting in conformity with Article 5, Section 1 of the by-laws of said corporation; whereupon all of said defendants left said meeting room and plaintiffs proceeded to organize as the board of directors of said defendant corporation.

19. At said organization meeting of said board of directors held immediately after said stockholders' meeting, as aforesaid, the following persons were present:

Plaintiffs Mina H. Johnson, A. G. Brodie, and Sigmund Beel. At said organization meeting the following officers of defendant corporation were duly elected and chosen by plaintiffs, acting as directors in said corporation, in accordance with Article 5, Section 1 of the by-laws of said corporation, to-wit:

President.....Mina H. Johnson
Vice-president.....Sigmund Beel
Secretary-treasurer.....A. G. Brodie

to serve as such officers until the election and qualification of their successors in office.

20. Defendants F. E. Horton, Frank Horton, Jr., and R. McCarthy, are purporting to act as the board of directors of defendant corporation and F. E. Horton, A. F. Price, and R. McCarthy are purporting to act as the president, vice-president, and

secretary-treasurer of said defendant corporation, respectively. Defendants F. E. Horton, A. F. Price, and R. McCarthy as the purported president, vice-president, and secretary-treasurer of defendant corporation are in possession of the books, records, and properties of defendant corporation and have refused and still [9] refuse to deliver the same to plaintiffs herein, although demand has been made therefor.

Wherefore, plaintiffs pray for the following relief:

(a) That pending this suit a receiver be appointed to take charge of all the books, accounts, property, and assets of defendant corporation with the usual additional powers of a receiver in like cases.

(b) That an injunction be issued restraining defendants F. E. Horton, Frank Horton, Jr., R. McCarthy, and A. F. Price from exercising or purporting to exercise the rights and functions of directors and/or officers in defendant corporation as aforesaid.

(c) That said defendants and their agents, servants, and attorneys be directed forthwith to deliver to said receiver, or to the plaintiffs if a receiver be not appointed, all the books, assets, and property of said defendant corporation.

(d) That the pretended election of defendants F. E. Horton, Frank Horton, Jr., and R. McCarthy

as directors in defendant corporation, as aforesaid, be declared illegal and void.

(e) That any pretended election and/or purported office holding of F. E. Horton as president, A. F. Price as vice-president, and R. McCarthy as secretary-treasurer of said corporation be declared illegal and void.

(f) That said purported amendment of the by-laws of defendant corporation purporting to disqualify for voting purposes stock issued by defendant corporation on which assessments are unpaid, as alleged in paragraph 15 hereof, be declared illegal and void. [10]

(g) That plaintiffs Mina H. Johnson, Sigmund Beel, and A. G. Brodie, be declared and adjudicated legally elected directors of defendant corporation to serve as such until the next annual meeting of the stockholders of defendant corporation, as provided by the by-laws of defendant corporation.

(h) That plaintiffs Mina H. Johnson, Sigmund Beel, and A. G. Brodie, be declared and adjudicated the legally elected and acting president, vice-president, and secretary-treasurer, respectively, of defendant corporation to serve as such officers until the election and qualification of their successors in office as provided by the by-laws of defendant corporation.

(i) Such further relief as to this Court seems fit.

Dated, May 23rd, 1932.

M. E. GIBSON,
Attorney for Plaintiffs,
No. 1 Montgomery Street,
San Francisco, California. [11]

United States of America,
State of California,
City and County of San Francisco.—ss.

Mina H. Johnson, being duly sworn, deposes and says:

That she is one of the plaintiffs in the above entitled action; that she has read said amended bill of complaint and knows the contents thereof; that said amended bill of complaint is true of her own knowledge, except as to the matters therein alleged on information and belief and as to those matters she believes it to be true. That she makes this verification on behalf of her co-plaintiffs as well as for herself.

MINA H. JOHNSON,
Affiant.

Subscribed and sworn to before me this 23rd day of May, 1932.

[Seal] LEONTINE E. DENSON,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 3, 1935. [12]

"EXHIBIT A."

BY-LAWS OF
WEEPAH HORTON GOLD MINES
COMPANY

Article I.

Offices.

Section 1. The registered office shall be in the City of Tonopah, Nevada. The agent in charge of said office, upon whom process against the company may be served, is H. Howard Gray.

Section 2. The company may also have an office in the City of Reno, State of Nevada, and also have offices in such other places as the board of directors may appoint.

Article II.

Meeting of Stockholders.

Section 1. The annual meeting of the stockholders of this corporation in the City of Reno, State of Nevada, on the 1st Tuesday in February in each year, at 3:00 P. M. for the election of directors and such other business as may properly come before the meeting. Notice of the time, place and object of such meeting shall be given by publication thereof in a newspaper, published in the county where the election is held, at least once each week for two consecutive weeks immediately preceding such meeting, and by mailing at least fifteen days previous to such meeting, postage prepaid, a copy of such

notice addressed to each stockholder, at his residence or place of business as the same shall appear on the books of the corporation. No business other than that stated in such notice, shall be transacted at such meeting without the unanimous consent of all stockholders present thereat in person or by proxy.

Sec. 2. Special meetings of the stockholders shall be held at the office of the company in Reno, Nevada, and may be called at any time by the president, or by a majority of the directors, or by a call signed by stockholders holding one-third of the voting stock of the company. Notice of every special meeting, stating the time, place and object thereof, shall be given by mailing, postage prepaid, at least ten days before such meeting, a copy of such notice, addressed to each stockholder at his post office address as the same appears on the books of the company. The time of mailing all notices mentioned in these by-laws shall be deemed to be the time of giving of such notice.

Sec. 3. At all the meetings of the stockholders there shall be present, either in person or by proxy, stockholders owning a majority of the outstanding capital stock of the corporation, in order to constitute a quorum, except where otherwise provided by statute or the certificate of incorporation.

Sec. 4. At all meetings of stockholders only such persons shall be entitled to vote, in person or by proxy, who shall appear as stockholders on the

transfer books of the corporation for twenty (20) days immediately preceding such meeting. At any regular or special meeting each shareholder shall be entitled to one vote for every share of stock held in his name.

In all elections for directors each stockholder may accumulate his shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or distribute them on the same principal among as many candidates as he shall think fit.

Sec. 5. At all elections of directors the polls shall be opened and closed, the proxies shall be received and taken in charge, all questions touching the qualifications of voters and the validity of the [13] proxies, and the acceptance or rejection of the votes shall be decided and all ballots shall be received and counted by two inspectors. Such inspectors shall be appointed by the presiding officer of such meeting, shall be sworn faithfully to perform their duties, and shall, in writing, certify the returns.

Sec. 6. At the annual meeting of stockholders the following shall be the order of business:

1. Calling of Roll.
2. Proof of Notice of Meeting.
3. Report of President.
4. Report of Treasurer.
5. Report of Secretary.
6. Report of committees.

7. Appointment of Inspectors of Election of directors.

8. Election of directors.

9. Miscellaneous.

Sec. 7. At all meetings of stockholders, all questions, except the question of an amendment to by-laws and the election of directors, and all such other questions, the manner of deciding which is especially regulated by statute, shall be determined by a majority vote of the stockholders present, in person or by proxy; provided, however, that any qualified voter may demand a stock vote, and in that case such vote shall immediately be taken and each stockholder present in person or by proxy, shall be entitled to one vote for each share of stock owned by him as provided in Section 4. All voting shall be viva voce, except that a stock vote shall be by ballot, each of which shall state the name of the stockholder voting and the number of shares owned by him, and in addition, if such ballot be cast by proxy, it shall also state the name of such proxy.

Sec. 8. At any annual meeting, if a majority of the stock shall not be represented, the stockholders present shall have power to adjourn from day to day, without notice, until a majority be represented, not exceeding ten such adjournments, or to adjourn to a day certain, and notice of the meeting of the adjourned day shall be given by depositing the same in the post office addressed to each stockholder at least five days before such adjourned

meeting, exclusive of the day of mailing; but if a majority of the stock be present in person or by proxy, they shall have power from time to time to adjourn the annual meeting to any subsequent day or days, and no notice of the adjourned meeting need be given. Special stockholders' meetings may be continued in like manner.

Sec. 9. If any meeting provided for in this code of by-laws shall fall upon a legal holiday, the same shall be held upon the next succeeding business day at the same hour and place.

Article III.

Directors.

Section 1. The directors of this corporation shall be elected by ballot, for the term of one year, at the annual meeting of stockholders, except as hereinafter provided for filling vacancies. The directors shall be chosen by a plurality vote of the stockholders, voting either in person or by proxy at each annual election. The directors shall each hold at least one share of stock.

Sec. 2. Vacancies in the board of directors occurring during the year, shall be filled for the unexpired term by a majority vote of the remaining directors at any special meeting called for that purpose or any regular meeting of the board.

Sec. 3. In case the entire board of directors shall die or resign, any stockholder may call a special meeting of stockholders in the same manner that

the president may call such meeting, and the directors for the unexpired term may be elected at such meeting in the manner provided for their election at annual meetings. [14]

Sec. 4. The board of directors may adopt such rules and regulations for the conduct of their meetings and management of the affairs of the corporation as they deem proper, not inconsistent with the laws of the state of Nevada or these by-laws.

Sec. 5. The board of directors shall meet on 1st Monday of every month at the office in Reno, Nevada, or whenever called together by the president upon notice given to each director. On the written request of any director, the secretary shall call a special meeting of the board. At such meeting a majority shall constitute a quorum for the transaction of business.

Sec. 6. All directors' meetings shall be called upon notice in writing, signed by the secretary, and served as follows, viz.: Personally upon the director, or by mailing or leaving such written notice at the last known place of business of the director, personal service shall be made at least one day prior to the date of the meeting; the alternative method of service shall be at least five days before the date of the meeting. Any director may waive notice of such meetings. If all directors are present, meeting may be held without notice.

Sec. 7. The board of directors and the executive committee shall, except as otherwise provided by

law, have power to act in the following manner: a resolution in writing, signed by all the members of the board of directors or executive committee, shall be deemed to be action by such board or executive committee, as the case may be, to the effect therein expressed, with the same force and effect as if the same had been duly passed by the same vote at a duly convened meeting, and it shall be the duty of the secretary of the company to record such resolution in the minute book of the company under its proper date.

Sec. 8. Any director or directors may be removed at the pleasure of a majority of the issued outstanding stock. Any officer or officers may be removed at the pleasure of a majority of the directors. A majority of the board of directors shall have power to appoint and remove at pleasure the superintendent, manager, general manager, and any and all other subordinate officers, employees, agents and servants of the company.

Article IV.

Executive Committee and Other Committees.

Section 1. The board of directors may appoint three of their own number to act as an executive committee to serve during the life of the board that appointed it, or until further action of the board.

Sec. 2. The executive committee shall have entire control and supervision of all the property and business affairs of the corporation, and shall have

and exercise all the powers and privileges which are possessed and exercised by the board of directors.

Sec. 3. All actions of the executive committee shall be reported to the board at its meeting next succeeding, and such action shall be subject to revision or alteration by the board; provided, that no right of third parties shall be affected by such revision or alteration.

Sec. 4. From time to time the board may appoint any other committee or committees for any purpose or purposes, who shall have such powers as shall be specified in the resolution of appointment.

Article V.

Officers.

Section 1. The board of directors immediately after the annual meeting shall choose one of their number by a majority vote to be president, and it shall appoint a vice-president, second vice-president, [15] secretary, treasurer and assistant treasurer, and such other subordinate officers as it shall deem necessary. Each of such officers shall serve for the term of one year, or until the next annual election, or until a successor is duly and regularly elected. Vacancies occurring among the officers may be filled by the board of directors for the unexpired term.

Sec. 2. The president shall preside at all meetings of the board of directors, and shall act as chairman at, and call to order, all meetings of stockholders. He shall sign all certificates of stock.

He shall submit a complete report of the operations and condition of the company for the year to the directors at their regular meeting in January and to the stockholders at their regular meeting in February of each year, and from time to time shall report to the directors all matters within his knowledge which the interests of the company may require to be brought to their notice; he shall be an ex-officio member of all standing committees, and shall have the general powers of supervision and management usually vested in the office of president of a corporation, consistent with these by-laws.

Sec. 3. The vice-president shall in the absence or incapacity of the president, perform the duties of that office, so long as such absence or incapacity continues, or until the board shall otherwise determine.

Sec. 4. The treasurer shall have the custody of all the funds and securities of the corporation, and deposit the same in the name of the corporation in such bank or banks as the directors may select; he shall sign all checks, drafts, notes and orders for the payment of money, and he shall pay out and dispose of the same under the direction of the president. He shall at all reasonable times exhibit his books and accounts to any director or stockholder of the company upon application at the office of the company during business hours. He shall give such bond for the faithful performance of his duties as the board of directors may require. Any rep-

utable bank may act as a treasurer or as depositary or both.

Sec. 5. The secretary shall keep the minutes and proceedings of the board of directors and the minutes of the meetings of stockholders; he shall attend to the giving and serving of all notices of the company; he shall affix the seal of the company to all certificates of stock; he shall have charge of the certificate book and such other books and papers as the board may direct; he shall attend to such correspondence as may be assigned to him, and shall perform all the duties incidental to his office. He shall also keep a stock book containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares held by them respectively, the time when they respectively became owners thereof, and such book shall be open for the inspection of stockholders during the usual business hours at the office of the company. He shall sign all certificates of stock signed by the president. He shall make all reports required by the acts of Congress, by the laws of the state or states of..... and it shall be his duty to keep himself posted as to the requirements of the law in that behalf; he shall also advise the treasurer as to when any taxes are legally due to be paid by the company.

Sec. 6. The counsel of the company shall prepare all such contracts and agreements required in

the business of the company as may be referred to him by its officials; he shall inspect and pass upon all such instruments as may be presented to the company and be of sufficient importance to justify such examination. He shall also advise with the officers of the company in such legal matters pertaining to the affairs of the company as may require his consideration. [16]

Sec. 7. In the absence of any officer, the board of directors may delegate his powers and duties to any other officer, or to any director for the time being.

Article VI.

Capital Stock.

Section 1. Certificates of stock shall be numbered and registered in the order in which they are issued, and shall be signed by the president and secretary, and the seal of the corporation shall be affixed thereto. All certificates shall be bound in a book, and be issued in consecutive order therefrom, and in the margin thereof shall be entered the name and address of the person owning the shares therein represented, the number of shares and the date of issuing thereof. All certificates exchanged or returned to the corporation shall be marked cancelled, with the date of cancellation, by the secretary, and shall be immediately pasted in the certificate book opposite the memorandum of its issue. The vice-president and assistant secretary may also sign certificates of stock.

Sec. 2. Transfers of such shares shall only be made upon the books of the corporation by the holder in person or by power of attorney duly executed and acknowledged and filed with the secretary of the corporation, and on the surrender of the certificate or certificates of such shares.

Sec. 3. The board may appoint a transfer agent and a register of transfers, and may require all certificates to bear the signature of either or both.

Article VII.

Dividends and Fiscal Year.

Section 1. Dividends shall be declared and paid out of the surplus profits of the corporation as often and at such times as the board may determine. No dividends shall be declared or paid that tend to curtail the effective operation of the business.

Sec. 2. The fiscal year of the company shall begin the 1st day of January and terminate on the 31st day of December, in each year.

Article VIII.

Seal.

Section 1. The seal of the corporation shall be in the form of a circle, and shall bear the name of the corporation, the year of its incorporation, and the name of the State of its domicile.

Article IX.

Amendments.

Section 1. The board of directors shall have power to amend or repeal the by-laws of the company by a vote of a majority of all the directors at any regular or special meeting of the board; provided, that notice of intention to make, amend or repeal the by-laws in whole or in part at such meeting shall have been previously given to each member of the board; or without any such notice by a vote of two-thirds of all the directors.

Sec. 2. All the by-laws shall be subject to amendment, alteration and repeal at any annual meeting of stockholders or at any special meeting called for that purpose. [17]

EXHIBIT B.

ARTICLES OF INCORPORATION

of

WEEPAH HORTON GOLD MINES COMPANY

KNOW ALL MEN BY THESE PRESENTS: That the undersigned have this day associated ourselves for the purpose of forming a corporation for mining and other purposes hereinafter set forth, under the laws of the State of Nevada, and hereby certify:

I.

The name of this corporation shall be WEEPAH HORTON GOLD MINES COMPANY.

II.

The location of said corporation's principal office and place of business in the State of Nevada shall be at the office of the Electric Gold Mines Company situated on the east side of Main Street opposite the Elks Club Building, in Tonopah, Nye County, Nevada. The company may also have on or more offices outside of the State of Nevada where the books of the company may be kept and meetings of the directors and stockholders may be held, as may be determined by the Board of Directors.

III.

The nature of the business and the objects and purposes for which this corporation is formed are to do any and all things herein set forth, to the same extent and as fully as natural persons might or could do, and in any part of the world, as principal, agent, contractor, trustee, or otherwise, and either alone, or in company with others namely:

Locating, working, developing, leasing, buying, selling and otherwise dealing in mines, mining locations, mining claims, mining rights, mineral deposits, millsites, tunnel sites, tunnel claims, water rights, mining plants, machinery, or works used in connection therewith; also to engage in and [18] carry on the business of crushing, milling, smelting, refining, and preparing for market, gold, silver, lead, tin, copper, zinc and other ore, coal, petroleum, oil, minerals and mineral substances of all kinds,

and to carry on any other reducing, smelting or metallurgical operations, which may seem conducive to any of this corporation's objects, purposes or business, and also to engage in and carry on the business of buying, selling, manufacturing and dealing in minerals, ores, metals, mining plants, machinery, implements, conveniences, provisions and things used in connection with the business of this corporation, or required by the workmen and others employed by this corporation.

To acquire by purchase, or otherwise, own, hold, develop, buy, sell, convey, lease, mortgage or encumber lands, real estate, water or other property, personal or mixed.

To survey, subdivide, plat, improve, and develop lands for purposes of sale or otherwise, and to do and perform all things needful and lawful for the development and improvement of the same for residence, trade and business.

To purchase, construct, lease, operate and maintain electric lighting and power plants, buildings, constructions, machinery, appliances, equipments, fixtures, easements and appurtenances.

To purchase, construct, lease, operate and maintain telephone lines and lines for electric light and power purposes.

To furnish electricity for power and lighting purposes and all appliances incident or necessary thereto.

To purchase, construct, lease, operate and maintain tramways, rights of way, easements and appurtenances.

To construct, purchase, develop, or otherwise acquire, maintain, repair and operate water and water works, sewer plants and drainage system, and to sell, lease, or rent water and water rights and privileges. [19]

To buy, sell, and generally trade in, store, carry and transport all kinds of goods, wares, merchandise, provisions and supplies.

IN FURTHERANCE AND NOT IN LIMITATION of the general powers conferred by the laws of the State of Nevada, and of the objects and purposes herein set forth, it is expressly provided that this corporation shall also have the following powers, that is to say:

1. To acquire the good will, rights, property and franchises, and to undertake the whole or any part of the assets and liabilities of any person, firm, association or corporation, and to pay for the same in cash, stock or bonds of this corporation, or otherwise to hold, or in any lawful manner to dispose of the whole or any part of the property so purchased, to conduct in any lawful manner the whole or any part of the business so acquired and to exercise all the powers necessary or convenient in and about the conduct and management of such business.

2. To hold, purchase, accept as security for debts of the corporation, or otherwise acquire, sell,

guarantee, underwrite, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of this corporation and stocks and bonds or other evidences of indebtedness created by any other corporation or corporations of this state, or any other state, or territory, country or government and while the holder of such stock, to exercise all the rights and privileges of ownership, including the right to vote thereon, to the same extent as natural persons might or could do.

3. To make and enter into and perform contracts of every sort and kind for any lawful purpose with any individual, firm, association, corporation, private, public or body politic, and with the Government of the United States or any state, territory or colony thereof, and to draw, make, accept, indorse, discount, execute and issue promissory notes, bills of exchange, warrants, bonds, debentures and other negotiable [20] or transferable instruments, so far as may be permitted by the laws of the State of Nevada.

4. To apply for, or in any manner acquire, and to hold, own, use and operate, or sell, or in any manner dispose of, and to grant license or other rights, inventions, improvements and precesses used in connection therewith or secured under letters patent or copyrights of the United States, or other countries; and to make, operate or develop the same, and to carry on any business, manufacturing or otherwise, which may directly or indirectly effectuate these objects, or any of them.

5. To purchase, hold, cancel and re-issue the shares of its capital stock.

6. To conduct its business or any part thereof in any and all parts of the world, and to have one or more offices out of the State of Nevada, and to purchase or otherwise acquire, hold, mortgage, or otherwise lien and encumber, and sell, convey and transfer real and personal property of every kind and nature, both within and without the State of Nevada, and to issue its bonds in pursuance thereof.

7. In general to carry on any other business within or without the State of Nevada, in connection therewith, whether manufacturing, merchandising or otherwise, not forbidden by the laws of the State of Nevada and with all the powers conferred by the said laws upon said corporations.

8. To become and be the trustee of any person, firm, association, or corporation, and to exercise all the powers and privileges of a trustee, in accordance with the terms and conditions of the trust under and by which the same is committed to it.

9. It is the intention that the objects, purposes and powers specified in this third paragraph shall, except where otherwise expressed in said paragraph, be nowise limited or restricted by reference to, or inference from the terms of any other clause or paragraph in this certificate of incorpor- [21] ation, but that the objects, purposes and powers specified in each of the clauses of this certificate of

incorporation shall be regarded as independent objects, purposes and powers.

IV.

(a.) The maximum number of shares with nominal or par value, that this corporation shall be authorized to have outstanding at any time is Two Million Five Hundred Thousand shares.

(b.) The maximum number of shares without nominal or par value that this corporation shall be authorized to have outstanding at any time is no shares.

(c.) All of said stock shall be common stock.

(d.) The nominal or par value of the shares other than shares which it is stated are to have no nominal or par value shall be ten cents (10¢) per share.

V.

The amount of capital with which this corporation will begin business will be $500.00.

VI.

(a.) The members of the governing board of this corporation shall be styled directors and the number of such directors shall be five.

(b.) The names and postoffice addresses of the first board of directors are as follows:

Name	Residence	Postoffice Address
F. E. Horton	Tonopah, Nevada	Tonopah, Nevada
Iven Jeffries	do	do
H. Perry	do	do
Wm. Forman	do	do
Alfred Boyle	do	do

VII.

Whenever the amount of the subscription price or par value of the capital stock of this corporation has been paid in, said stock shall be subject to assessment to pay debts of [22] the corporation and ~~no paid up stock and no stock issued as fully paid up shall ever be assessable or assessed by this corporation~~ carry on development work on its property.

VIII.

The name and post office address of each subscriber of these articles of incorporation, and the number of shares of stock which each agrees to take is as follows:

Name	Residence	Postoffice Address	Shares
Iven Jeffries	Tonopah, Nevada	Tonopah, Nevada	498
Alfred Boyle	do	do	1
H. Perry	do	do	1

IX.

This corporation is to have a perpetual existence.

X.

(a.) The Board of Directors shall have the power and authority to make and alter or amend the by-laws, to fix the amount, in cash or otherwise, to be reserved as working capital, and to authorize and cause to be executed mortgages and liens upon the property and franchises of this corporation.

(b.) The Board of Directors shall have power and authority with consent in writing, and pursuant to the vote of a majority of the capital stock issued, and outstanding, to sell, assign, transfer, or otherwise dispose of the whole property and business of this corporation, but not otherwise.

(c.) The Board of Directors shall, from time to time, determine whether, and to what extent, and at what times and places and under what conditions and regulations the accounts and books of this corporation, or any of them, shall be opened to the inspection of the stockholders; and no stockholders shall have the right to inspect any account, or book, or document, of this corporation, except as conferred by the Statutes of the State of Nevada, or authorized by the directors, or by resolution of the stockholders.

(d.) The stockholders and directors shall have the [23] power to hold their meetings, and keep the books, documents and papers of this corporation outside of the State of Nevada, and at such places as may from time to time be designated by the

by-laws or by resolution of the stockholders or directors, except as otherwise required by the laws of the State of Nevada.

(e.) No stockholder in this corporation shall have a preference over any one not a stockholder to purchase any new stock in this corporation, sold for cash, unless the Board of Directors, by a majority vote before the sale of said stock, shall deem it expedient, that the stockholders have such preference.

(f.) At all elections of directors of this corporation, each holder of stock possessing voting power, shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected and he may cast all of such votes for a single director, or may distribute them among the number to be voted for or any two or more of them as he may see fit.

IN WITNESS WHEREOF, the said incorporators have hereto subscribed their names this 26 day of March A. D. 1927.

IVEN JEFFRIES,
H. PERRY,
ALFRED BOYLE.

State of Nevada,
County of Nye.—ss.

Before me, Wm. Forman, a Notary Public, in and for said County, personally appeared Iven Jeffries, Alfred Boyle, H. Perry, known to me to

be the persons named in and who executed the foregoing Articles of Incorporation, and acknowledged to me that they executed the same, freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial Seal this 26th day of March, A. D. 1927.

[Seal] WM. FORMAN,
Notary Public. [24]

"EXHIBIT C"

NOTICE OF SPECIAL MEETING OF THE STOCKHOLDERS OF WEEPAH HORTON GOLD MINES CO., a corporation, FOR THE ELECTION OF DIRECTORS.

Reno, Nevada,
March 9th, 1932.

To the stockholders of Weepah Horton Gold Mines Co., a corporation:

The undersigned, stockholders of Weepah Horton Gold Mines Co., a corporation, organized under the laws of the State of Nevada, holding more than one-third of the voting stock of said corporation, and each holding the number of shares of said stock set after his name, respectively, hereby call a special meeting of the stockholders of said Weepah Horton Gold Mines Co., for the purpose of electing di-

rectors of said corporation for the ensuing year and until the election and qualification of their successors in office. Said meeting of said stockholders is called pursuant to the provisions of article II Section 2 of the by-laws of said corporation and the laws of the State of Nevada; and said meeting of said stockholders will be held on the 21st day of March, 1932, at the hour of 10:00 o'clock A. M. of said day at the office of said corporation in Reno, Nevada, in Room 13 United Nevada Bank Bldg., in said city, for the election of said directors, as aforesaid, and for the transaction of such other business as may properly come before said meeting.

Yours very truly,

Name of Stockholder in Said Weepah Horton Gold Mines Co., a corp.	Number of Said Shares Held
F. W. Baude	166 800
A. G. Brodie	10 000
I. E. Johnson by Mina H. Johnson Executrix—Mina H. Johnson as Executrix of the estate of I. H. Johnson, deceased	167 000
J. J. Davis	110 000
Herbert L. Davis	160 000

[25]

"EXHIBIT D"

Mr. A. F. Price, Vice President,
Weepah Horton Gold Mines Company,
Reno, Nevada.
Dear Sir:—

We, the undersigned, this morning appointed by you as a committee to examine and report on the number of shares of stock represented in person or by proxy at the meeting of your stockholders held this date, beg leave to report as follows:

The following stockholders WHO HAVE PAID THE ASSESSMENT on their stock are present in person:

Name	Shares
F. E. Horton	336,100
A. F. Price	500
R. McCarty	100
Total	336,700

The following stockholders WHO HAVE PAID THE ASSESSMENT on their stock have given proxies to M. E. Gibson to vote their stock:

Name	Shares
Mrs. L. M. Bartel	2,000
Burton Baxter	1,000
Thos. C. Brandenbrug	2,000
Curtis I. Brower	3,000
Frank C. Campbell	2,500
Alice S. Dailey	2,000
J. J. Davis	20,000
Herbert L. Davis	10,000
Emma May Davis	20,000
Irma B. Downing	1,000
T. H. Dudley	1,000
F. W. Miers	500
M. S. Miers	500
F. R. Shumack	2,000
H. P. Tracy	1,250
Myrtle S. Vieregg	5,000
Martha H. Simpson	2,000
Total	75,750

The following stockholders WHO HAVE PAID THE ASSESSMENT on their stock have given proxies to Mina H. Johnson to vote their stock:

Name	Shares
James A. Clark	1,000
Chas. L. Conte	3,000
D. Costa	3,000
Edw. P. Spengler	2,500
Total	9,500

[26]

The following stockholders WHO HAVE PAID THE ASSESSMENT on their stock have given proxies to F. E. Horton to vote their stock:

Name	Shares
A. C. Agnew	2,000
Gertrude Allender	350
Anna C. Bahntge	70
D. Bardas	200
Ross M. Brasington	65
C. L. Brink	500
Ruth A. Brink	500
D. M. Brereton	2,500
Mrs. Warren Bybee	100
J. C. Carner	1,000
R. Cawley	1,500
L. H. Cook	100
LeRoy B. Cramer	65
C. L. Crellin	10,000
Fred Crosby	100

Name	Shares
Chas. W. Davis	500
Frank Dobson	200
F. W. Elkins	100
Wilson F. Ewing	500
Edward E. Frank	2,000
Mira Dewey Caroutte	500
J. J. or Veda L. Haskin	8,000
Emma L. Hawks	100
George F. Hoffman	100
O. F. Holmes	8,750
Frank Horton, Jr.	100
A. L. Houseworth	1,000
Iven Jeffries	20,900
Sara Kenner	500
George C. Keough	500
John Krusiewski	1,000
Nelson A. Larsen	500
Minnie B. or Fred Lehman	2,000
Peyton Lewis	100
C. B. Limbecker	500
H. J. Littlejohn	1,000
Wm. A. Luning	100
Lewis Sayre Mace	1,000
E. D. Meissner	1,000
L. Morris	2,000
Mart Morse	2,000
F. S. Myers	3,000
John H. Nebergall	100
W. H. O'Connor	500
H. B. Owens	100

Name	Shares	
Jules Petrequin	200	
A. S. Roberts	100	
A. C. Roscoe	14,500	
Thomas H. Roscoe	1,000	
Anthony J. Rossi	500	
Mrs. M. S. Saint-Amand	80	
John W. Sechrist	100	
Total carried forward		94,180
		[27]
Brought forward		94,180
Name	Shares	
H. Preston Smith	2,500	
Edith C. Stockdale	100	
E. F. Tholen	1,000	
E. H. Van Velsor	24,250	
Mrs. A. C. Voss	100	
R. E. Weeden	500	
A. W. Werner	1,000	
Mrs. M. F. White	5,000	
Wm. Whitehead	100	
Flora E. Zutz	100	34,650
Total		128,830

Stockholder W. Howard Gray, WHO HAS PAID HIS ASSESSMENT, has given his proxy to Wm. McKnight 100 shares

Stockholder Joseph F. McLaughlin, WHO HAS PAID HIS ASSESSMENT, has given his proxy to Wm. Forman, Jr., 10 shares

The above mentioned stockholders, having paid their assessment, are entitled to vote the number of shares set after their respective names. The proxies have been carefully checked by your committee and the persons whose names are above given as holding said proxies are entitled to vote the respective shares.

The following stockholders WHO HAVE NOT PAID THEIR ASSESSMENT AND WHO ARE NOT ENTITLED TO VOTE at this special stockholders meeting have given proxies to M. E. Gibson to vote their stock:

Name	Shares
H. E. Hudson	7,000
H. J. Engelbrecht	15,000
Herbert L. Davis	6,000
J. J. Davis	90,000
F. W. Baude	166,800
Total	284,800

The following stockholders WHO HAVE NOT PAID THEIR ASSESSMENT AND WHO ARE NOT ENTITLED TO VOTE at this special stockholders meeting have given proxies to Mina H. Johnson to vote their stock:

Name	Shares
J. Moore	2,000
B. A. Thomas	3,000
C. F. Ford	22,500
A. G. Brodie	10,000
C. L. Rosenberg	1,000
D. Markovitz	1,000
Stella H. Ish	2,000
Mabel Ish Rosenthal	1,000
Sigmund Beel	6,000
Rowena Heald	5,000
L. S. Barton	1,000
F. B. Peterson	6,000
W. F. Haynie	12,500
R. S. Norris	3,000
Total	76,000

[28]

The following stockholders WHO HAVE NOT PAID THEIR ASSESSMENT AND WHO ARE NOT ENTITLED TO VOTE at this special meeting of stockholders have given proxies to F. E. Horton to vote their stock:

Name	Shares
H. J. Amigo & Co.	1,000
M. H. Bishop	1,000
C. L. Cornberger	3,000
M. J. Downie	6,000
E. F. Dreger	500
A. O. Eppler	1,250
I. N. Faust, Jr.	10
E. Franklin	1,000
J. Crasser	100
D. J. Haggerty	11,800
L. F. Henderson	1,000
P. Kanne	100
M. C. Marshall	500
C. F. Painter	600
A. Pollexson	1,000
C. L. Richards	25,400
W. H. Simmons	2,000
S. E. Upright	300
Boyd L. Wilson	1,000
Total	57,560

You will notice from the above that there are 550,890 shares represented in person or by proxy entitled under the by-laws of this corporation to vote at this meeting, being as follows:

M. E. Gibson, proxy	75,750 shares
Mina H. Johnson, proxy	9,250 shares
F. E. Horton, proxy	128,830 shares
Wm. McKnight, proxy	100 shares
Wm. Forman, Jr., proxy	10 shares
R. McCarthy	100 shares
F. E. Horton	336,100 shares
A. F. Price	500 shares
Total	550,890 shares

Mrs. Mina Johnson, executrix of the estate of I. H. Johnson, deceased, is present in person, but the assessment on no part of said stock, standing in the name of I. H. Johnson has been paid and said stock is not entitled to vote at this meeting.

Dated, Reno, Nevada, this twenty-first day of March, 1932.

Wm. McKnight (signature)
Wm. Forman, Jr., (signature)
Committee on Proxies. [29]

Mr. A. F. Price, vice-president,
Weepah Horton Gold Mines Company,
Reno, Nevada.
Dear Sir:

I find the stock present in person and by proxy, hereinbefore certified by two of the members ap-

pointed by the Chair to examine and report on the number of shares represented in person or by proxy of even date herewith, is correct. I do not concur, however, in the conclusions stated by said two members of the committee, to-wit: Wm. Forman, Jr., and Wm. McKnight, as to the disqualification for voting purposes of the stock on which assessments have not been paid to date, and which, according to the notice recently sent to the stockholders, is to be sold on the eighteenth day of April, 1932, and state, in my opinion, that all stock present in person or by proxy today is entitled to vote at this meeting; the purported attempt to amend the by-laws of the corporation to disqualify from voting stock on which assessments have not been paid, being an invalid act which is null and void and beyond the powers of the directors to accomplish in the manner attempted, and ineffectual to accomplish that purpose.

Dated, at Reno, Nevada, this twenty-first day of March, 1932.

M. E. GIBSON,
One of said Committee. [30]

"EXHIBIT E."

We, the undersigned, Inspectors of election to examine, canvass and report the votes cast at the special stockholders meeting of the Weepah Horton Gold Mines Company, a corporation, held in Reno, Nevada, on the twenty-first day of March, 1932, hereby report that, of the votes entitled to be counted at this election, the following persons received the following votes for directors of said corporation:

F. E. Horton	774,233	1/3 votes
Frank Horton, Jr.	774,233	1/3 votes
R. McCarthy	774,233	1/3 votes
Mina H. Johnson	142,083	1/3 votes
A. G. Brodie	142,083	1/3 votes
Sigmund Beel	142,083	1/3 votes

Respectfully submitted,

(signature) WM. McKNIGHT,

(signature) WM. FORMAN, JR.

[Endorsed]: Filed May 24, 1932. E. O. Patterson, Clerk. [31]

[Title of Court and Cause.]

MOTION TO DISMISS AMENDED BILL OF COMPLAINT.

Comes now the defendants above named and move the Court to dismiss the above entitled suit upon the following grounds:

I.

It appears upon the face of the amended bill of complaint in the above entitled cause that this suit does not really and substantially involve a dispute or controversy within the jurisdiction of this Court, because the amount in controversy does not exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest.

II.

The jurisdictional averment of the amount involved is clearly frivolous, as the amended bill of complaint shows that the matter in controversy is title to corporate offices, and that the same is not reducible to a money valuation.

III.

That said amended bill of complaint fails to state facts sufficient to constitute a cause of action in favor of [32] the plaintiffs and against these defendants or either of them.

IV.

The amended bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against these defendants or either of them.

V.

It appears on the face of said amended bill of complaint that said amended bill of complaint is wholly without equity.

VI.

The amended bill of complaint expressly shows that plaintiff, Mina H. Johnson, has no title to maintain this suit or to any relief against these defendants or either of them by reason of the facts herein alleged, in that it appears from said amended bill of complaint that any stock held by said Mina H. Johnson at the date of the corporate meeting therein mentioned was held by her as an executrix of the Estate of I. H. Johnson, deceased.

Wherefore, defendants pray that said amended bill of complaint be dismissed and that the said defendants be dismissed with their costs in this behalf incurred, and for such other and further relief as to the Court may seem just.

Dated this 31st day of May, 1932.

GEO. B. THATCHER,
WM. WOODBURN,
THATCHER & WOODBURN,
Attorneys for Defendants.

[Endorsed]: Filed June 1, 1932. E. O. Patterson, Clerk. [33]

[Title of Court and Cause.]

HEARING ON MOTION TO DISMISS AMENDED BILL OF COMPLAINT.

MINUTES OF COURT, June 27, 1932.

Plaintiffs' motion for leave to file supplemental bill of complaint and defendants' motion to dis-

miss the amended bill of complaint herein coming on for hearing this day by agreement of counsel, Maurice E. Gibson, Esq., appearing for and on behalf of the plaintiffs; Wm. Forman, Jr., Esq., of counsel, for the defendants. Upon the conclusion of argument by counsel for the respective parties, IT IS BY THE COURT ORDERED that plaintiffs' motion for leave to file supplemental bill of complaint joining Iven T. Jeffries, O. U. Pryce and P. N. Petersen as defendants be, and the same is hereby granted; and defendants' motion to dismiss the amended bill of complaint is hereby submitted on the oral argument and points and authorities herein heretofore filed and by the Court taken under advisement. [34]

[Title of Court and Cause.]

SUPPLEMENTAL BILL OF COMPLAINT.

To the Judge of the District Court of the United States for the District of Nevada:

Mina H. Johnson, Sigmund Beel and A. G. Brodie, plaintiffs herein, each of whom is a citizen of the State of California, said Mina H. Johnson and said Sigmund Beel residing in the City and County of San Francisco, in said State of California, and said A. G. Brodie residing in the County of Alameda, State of California, pursuant to leave of Court first had and obtained, file this their supplemental bill of complaint against F. E. Horton,

Frank Horton, Jr., R. McCarthy, A. F. Price, Iven T. Jeffries, O. U. Pryce and P. N. Pedersen, defendants, who are citizens of the State of [35] Nevada, each of whom resides in the County of Washoe, in said state and defendant Weepah Horton Gold Mines Company, a corporation, duly created and existing under the laws of the State of Nevada, and being a citizen of said state, having its principal place of business at Tonopah, in the County of Nye, in said state, and complain and say:

1. The defendant Iven T. Jeffries is a citizen of the State of Nevada and resides in the County of Washoe in said state.

2. The defendant O. U. Pryce is a citizen of the State of Nevada and resides in the County of Washoe in said state.

3. The defendant P. N. Pedersen is a citizen of the State of Nevada and resides in the County of Washoe in said state.

4. At the organization meeting of the board of directors held on the 21st day of March, 1932, referred to in paragraph 19 of plaintiffs' amended bill of complaint, a resolution was adopted establishing the principal office of the corporation, outside of the State of Nevada, at Room 1215 Crocker First National Bank Building, San Francisco, California, and providing that all meetings of the directors and stockholders of said corporation were to be held thereafter at said office; at said meeting a

resolution was also adopted declaring that the office of assistant secretary, at that time filled by defendant Iven T. Jeffries, was thereafter to be considered vacant and removing, as of said date, said defendant Iven T. Jeffries from said office.

5. On the 29th day of March, 1932, plaintiffs herein filed their original bill of complaint in this cause and [36] in said court against F. E. Horton, Frank Horton, Jr., R. McCarthy, and Weepah Horton Gold Mines Company, a corporation, defendants above named, for an injunction restraining said defendants F. E. Horton, Frank Horton, Jr., and R. McCarthy from exercising or purporting to exercise the rights and functions of officers in defendant corporation and for the decree of the court declaring that said plaintiffs had been duly elected directors and officers of said corporation as therein set forth.

6. On the 24th day of May, 1932, pursuant to leave of said court first had and obtained said plaintiffs filed an amended bill of complaint in said cause substantially in the same form and praying for the same relief as set forth in said original bill of complaint and adding the name of A. F. Price as a defendant in said action.

7. On the 16th day of April, 1932, at the hour of 10:00 o'clock A. M. of said day, a meeting of plaintiffs herein, as the directors of said defendant corporation, was held at said room 1215 Crocker First National Bank Building, in the City and

County of San Francisco, State of California, pursuant to written notice of said meeting duly served upon Mina H. Johnson and Sigmund Beel, plaintiffs herein and F. E. Horton, Frank Horton, Jr., and R. McCarthy, defendants herein more than two days prior to said 16th day of April, 1932, by A. G. Brodie as secretary of said corporation.

8. At said meeting of said directors held pursuant to said notice on the 16th day of April, 1932, in San Francisco, California, at which there were present plaintiffs Mina H. Johnson, Sigmund Beel and A. G. Brodie acting as directors of said corporation and no other party hereto being present, a [37] resolution was adopted by the affirmative vote of all of said three individuals, acting as directors of said corporation, extending, for a period of ninety (90) days from and after April 18th, 1932, the sale of any stock of said corporation on which said assessment No. 1, levied on the 22nd day of May, 1929, had not been paid.

9. Notice of said postponement of the sale date of said delinquent stock under said assessment was duly served upon all of the defendants herein prior to 10:00 o'clock A. M. on said 18th day of April, 1932; notwithstanding said notification of said postponement of said sale date defendants F. E. Horton and Iven T. Jeffries, proceeded in the name of the corporation on said 18th day of April, 1932, at the hour of 10:02 o'clock A. M. of said day, with the purported sale of alleged delinquent stock on which

said assessment had not been paid on the 18th day of April, 1932.

10. Said defendants F. E. Horton and Iven T. Jeffries purported at said time to make the following sales of delinquent stock:

Sold to defendant O. U. Pryce for the amount of assessment and costs:

Name	Cert. No.	Shares	Assmt.	Costs.
Amigo, H. J.	294	1000	10.00	1.00
Barton, L. S.	195	1000	10.00	1.00
		2000	20.00	2.00

Sold to defendant P. N. Pedersen for the amount of assessment and costs:

Name	Cert. No.	Shares	Assmt.	Costs.
Baude, F. W.	257-271 incl.	166,800	1668.00	15.00
Beel, Sigmund	169-170 incl.	6,000	60.00	2.00
Brodie, A. G.	141-147 incl.	10,000	100.00	7.00
Ford, C. F.	164-168 incl.	22,500	225.00	5.00
Haynie, W. F.	178-180 incl.	12,500	125.00	3.00
Johnson, I. H.	272-287 incl.	167,000	1670.00	16.00
Norris, R. S.	128-130 incl.	3,000	30.00	3.00
Peterson, F. B.	171-173 "	6,000	60.00	3.00
		393,000	$3938.00	54.00

[38]

Sold to defendant Weepah Horton Gold Mines Company for the amount of assesment and costs:

Name	Cert. No.	Shares	Assmt.	Costs.
Archibald, E. J.	107	100	1.00	1.00
Chung, M.	191	500	5.00	1.00
Codd, A. A.	98	1000	10.00	1.00
Downie, M. J.	344-346 incl.	6000	60.00	3.00
Dreger, E. F.	209	500	5.00	1.00
Egan, S.	134	100	1.00	1.00
Appler, A. O.	211	1250	12.50	1.00
Faust, Jr. I. N.	117	10	.10	1.00
Gallagher, C. F.	135	1000	10.00	1.00
Grasser, J.	330	100	1.00	1.00
Henderson, L. F.	342	1000	10.00	1.00
Hudson, M. J.	39	200	2.00	1.00
Ish, R. S.	189	2000	20.00	1.00
Ish, G. H.	188	2000	20.00	1.00
Jensen, P.	36	100	1.00	1.00
Kanne, P.	115	100	1.00	1.00
Markovits, D.	149	1000	10.00	1.00
McQuire, S. A.	204	100	1.00	1.00
Meyer, H. F.	297	300	3.00	1.00
Moore, J.	182	2000	20.00	1.00
Partner, L.	352	100	1.00	1.00
Paslouski, J.	123	100	1.00	1.00
Pollexren, A.	232	1000	10.00	1.00
Reiss, A.	131	1000	10.00	1.00
Rosenberg, C. L.	148	1000	10.00	1.00
Rosenthal, M.	190	1000	10.00	1.00
Scarrow, C. H.	208	100	1.00	1.00
Steil, William	133	200	2.00	1.00
Strieve, Rev. H.	301	200	2.00	1.00
Thomas, B. A.	187	3000	30.00	1.00

Name	Cert. No.	Shares	Assmt.	Costs.
Upright, S. E.	18	300	3.00	1.00
Weitzman, J.	322-338 incl.	1250	12.50	7.00
Wilson, B. L.	196	1000	10.00	1.00
Davis, J. J.	70-86 "	90,000	900.00	17.00
Davis, H. L.	52 & 54	6,000	60.00	2.00
Engelbrecht, H. J.	57 & 339	15,000	150.00	2.00
Hudson, H. H.	58 & 340	7,000	70.00	2.00
		147,610	$1,476.00	$66.00
Grand Total		543,410	$5,434.10	$120.00

11. Defendants O. U. Pryce, P. N. Pedersen, and Weepah Horton Gold Mines Company, purported to purchase said stock in connection with said purported delinquent sale, as aforesaid, with full and complete knowledge at the time of such [39] purported purchases of the action of plaintiffs herein in postponing said sale date, as aforesaid, and that notice of said continuance of said sale date had been communicated prior to said sale date and hour to defendants F. E. Horton and Iven T. Jeffries.

12. At the time of the filing of the amended bill of complaint herein plaintiffs had no knowledge of the purported sale for delinquent assessments of the stock referred to in paragraph 10 hereof, which they now allege and plead as authorized by Equity Rule 34.

Wherefore, plaintiffs pray for the decree of this Court removing the cloud on the title to said stock resulting from the purported sale for delinquent assessments, as aforesaid, and declaring the invalidity of said purported sales of stock and that said purchasers thereat obtained no right, title, or interest, in and to the stock purported to have been severally bought by them as a result of said sale, as aforesaid, in addition to the relief prayed for in the amended bill of complaint herein.

Dated, June 20th, 1932.

M. E. GIBSON,
Solicitor for Plaintiffs,
No. 1 Montgomery Street,
San Francisco, California. [40]

United States of America,
State of California,
City and County of San Francisco.—ss.

Mina H. Johnson, being duly sworn, deposes and says:

That she is one of the plaintiffs in the above entitled action; that she has read said supplemental bill of complaint and knows the contents thereof; that said supplemental bill of complaint is true of her own knowledge, except as to the matters therein alleged on information and belief and as to those matters she believes it to be true. That she makes this verification on behalf of her co-plaintiffs as well as for herself.

MINA H. JOHNSON.

Subscribed and sworn to before me this 20th day of June, 1932.

[Seal] LEONTINE E. DENSON,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 3, 1935.

[Endorsed]: Filed June 27, 1932. E. O. Patterson, Clerk. [41]

DECISION OF COURT ON MOTION TO DISMISS AMENDED BILL OF COMPLAINT.

MINUTES OF COURT, JULY 2, 1932.

MINA H. JOHNSON, SIGMUND BEEL and A. G. BRODIE,

Plaintiffs,

vs.

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, WEEPAH-HORTON GOLD MINES COMPANY, a corporation, organized and existing under the laws of the State of Nevada, IVEN T. JEFFRIES, O. U. PRYCE and P. N. PEDERSEN,

Defendants.

Defendants' motion to dismiss plaintiffs' amended bill of complaint herein having heretofore been argued, submitted and taken under advisement, IT IS NOW BY THE COURT ORDERED that the said motion to dismiss the amended bill of complaint

be, and the same is hereby granted; and the amended bill of complaint and supplemental bill of complaint are hereby dismissed. The Court reserves the right to file written opinion herein later. [42]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Hon. Frank H. Norcross, Judge of the District Court of the United States for the District of Nevada:

Mina H. Johnson, Sigmund Beel, and A. G. Brodie, your petitioners who are the plaintiffs in the above-entitled cause, conceiving themselves, and each of them, aggrieved by the order made and entered on the 2nd day of July, 1932, in the above-entitled cause, granting defendants' motion for the dismissal of the amended bill of complaint and the supplemental bill of complaint in the above-entitled cause and dismissing the amended bill of complaint and supplemental bill of complaint in the above-entitled cause, do hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenti- [43] cated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

The aforesaid petitioners, and each of them, pray that this appeal may be allowed on the giving of a cost bond in an amount to be fixed by this Court and petitioners pray for all general and equitable relief.

Dated, July 28th, 1932.

MAURICE E. GIBSON,
Solicitor for Plaintiffs.

[Endorsed]: Filed July 30th, 1932. E. O. Patterson, Clerk. [44]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now come the plaintiffs above named and say that in the record and proceedings of the said Court in the above-entitled cause and in the order made and entered therein on the 2nd day of July, 1932, there is manifest error and for error the said plaintiffs assign the following:

(1) The Court erred in sustaining the motion of defendants to dismiss the amended bill of complaint and the supplemental bill of complaint.

(2) The Court erred in dismissing the amended bill of complaint and in dismissing the supplemental bill of complaint.

Wherefore plaintiffs pray that said order may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated, July 28th, 1932.

MAURICE E. GIBSON,
Solicitor for Plaintiffs.

[Endorsed]: Filed July 30th, 1932. E. O. Patterson, Clerk. [45]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of solicitor for plaintiffs, it is ordered as follows:

1. That the appeal presented by plaintiffs herein be, and the same hereby is, allowed and that a certified transcript of the record and proceedings be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the rules of practice.

2. It is further ordered that bond for costs to be given by plaintiffs and complainants on said appeal be and the same is hereby fixed in the sum of $300.00 conditioned as provided by law.

3. It is further ordered that a citation be issued admonishing defendants to be and appear in the United [46] States Circuit Court of Appeals for the Ninth Circuit on or before September 1st, 1932.

Dated, August 1st, 1932.

FRANK H. NORCROSS,
United States District Judge.

[Endorsed]: Filed August 1, 1932. E. O. Patterson, Clerk. [47]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That the PACIFIC INDEMNITY COMPANY, as surety, are held and firmly bound unto the above named defendants, F. E. Horton et al., in the full and just sum of Three Hundred and no/100 Dollars ($300.00), to be paid to the said F. E. Horton, et al., to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seals and dated this 4th day of August, 1932.

WHEREAS, the District Court of the United States in and for the District of Nevada in a suit pending in said court between the above plaintiffs, Mina H. Johnson, et al., v. F. E. Horton, et al., defendants, by order made and entered on the 2nd day of July, 1932, granted defendants' motion for dismissal of the amended bill of complaint and the supplemental bill of complaint in the above entitled cause and dismissed the amended bill of complaint and supplemental bill of complaint in the above entitled cause, and the said plaintiffs have obtained from said court its order allowing an appeal from said order to the United States District Court of Appeals for the Ninth Circuit, and a citation directed to the said defendants citing and admonishing defendants to be and appear in the United

States Court of Appeals for the Ninth Circuit on or before September 1, 1932.

NOW, THEREFORE, the condition of the above obligation is such that if the said plaintiff shall prosecute this appeal to effect and answer and pay all costs if plaintiffs fail to make said appeal good, then the above obligation to be void; else to remain in full force and effect.

[Seal] PACIFIC INDEMNITY COMPANY,
My EARL A. DAVIS,
Attorney-in-Fact.

Countersigned by
E. F. LUNSFORD,
Attorney in fact for Nevada.

Approved Aug. 6th, 1932.

[Seal] FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed Aug. 6, 1932. E. O. Patterson, Clerk. [48]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court in and for the District of Nevada:

Sir:

You will please prepare a transcript of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit in pursuance to the

appeal heretofore taken in this case, and include therein the following:

1. Plaintiffs' amended bill of complaint.

2. Defendants' motion to dismiss amended bill of complaint.

3. Order of Court allowing plaintiff to file supplemental bill of complaint and permitting the joining of Iven T. Jeffries, O. U. Pryce, and P. N. Pedersen as defendants in said case and providing that defendants' motion to dismiss amended bill of com- [49] plaint shall be considered as applying to said supplemental bill of complaint and the defendants therein as well as said amended bill of complaint, which order was made in open court on the 27th day of June, 1932.

4. Plaintiffs' supplemental bill of complaint.

5. Order of Court under date of July 2nd, 1932, granting defendants' motion to dismiss amended bill of complaint and supplemental bill of complaint and dismissing the amended bill of complaint and supplemental bill of complaint.

6. Plaintiffs' petition for appeal.

7. Plaintiffs' assignment of errors.

8. Order of Court allowing appeal.

9. Citation on appeal.

MAURICE E. GIBSON,
Counsel for Plaintiffs-Appellants.

[Endorsed]: Filed August 5, 1932. E. O. Patterson, Clerk. [50]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

United States of America,
State of California,
City and County of San Francisco.—ss.

E. L. Shadle, being first duly sworn, deposes and says:

That she is secretary to M. E. Gibson, attorney for plaintiffs and appellants in the above entitled action with offices at No. 1 Montgomery Street, San Francisco, California; and that Messrs. Thatcher & Woodburn, attorneys for defendants and appellees above named, have offices in Reno, Nevada; that there is a regular service and communication by United States mail between said two cities of San Francisco, California, and Reno, Nevada; that on the 4th day of August, 1932, affiant served the petition for appeal, assignment of errors, and praecipe for transcript of record on Messrs. Thatcher & Woodburn, by placing in the United States mail, postage prepaid, a true and correct copy of said papers, enclosed in a sealed envelope, addressed to Messrs. Thatcher & Woodburn, Reno, Nevada.

E. L. SHADLE.

Subscribed and sworn to before me this 4th day of August, 1932.

[Seal] LEONLINE E. DENSON,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 3, 1935.

[Endorsed]: Filed August 5, 1932. E. O. Patterson, Clerk. [51]

[Title of Court and Cause.]

SUPPLEMENT TO PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court in and for the District of Nevada:

Sir:

In addition to the documents requested by me in the praecipe for transcript of record to be included in said record, you will add thereto a copy of the $300.00 bond for costs on appeal as provided in the order allowing the appeal.

MAURICE E. GIBSON,
Counsel for Plaintiffs-Appellants.

[Endorsed]: Filed Aug. 15, 1932. E. O. Patterson, Clerk. [52]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America.—ss.

To F. E. Horton, Frank Horton, Jr., R. McCarthy, A. F. Price, Weepah Horton Gold Mines Company, a corporation, Iven T. Jeffries, O. U. Pryce, and P. N. Petersen:

GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States in and for the District of Nevada, in a suit wherein Mina H. Johnson, Sigmund Beel, and A. G. Brodie, are appellants and you are appellees, to show cause, if any there be, why the order rendered against said appellants should [53] not be corrected, and why speedy justice should not be done to the parties on that behalf.

Given under my hand at San Francisco, in the Northern District of California, this 1st day of August, 1932.

[Seal] FRANK H. NORCROSS,

Judge of the District Court for the District of Nevada.

Service of a copy of the foregoing citation is acknowledged this 6th day of August, 1932.

THATCHER & WOODBURN,
Solicitors for Defendants.

[Endorsed]: Filed Aug. 19th, 1932. E. O. Patterson, Clerk. [54]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada.—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case above entitled.

I further certify that the attached transcript, consisting of 56 typewritten pages numbered from 1 to 56 inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $9.80, has been paid to me by Maurice E. Gibson, Esq., attorney for the plaintiffs and appellants in the [55] above-entitled cause.

And I further certify that the original citation, issued in said cause, is hereto attached.

WITNESS my hand and the seal of said United States District Court this 22nd day of August, A. D. 1932.

[Seal] E. O. PATTERSON,

E. O. Patterson, Clerk U. S. District Court for the District of Nevada. [56]

[Endorsed]: No. 6946. United States Circuit Court of Appeals for the Ninth Circuit. Mina H. Johnson, Sigmund Beel and A. G. Brodie, Appellants, v. F. E. Horton, Frank Horton, Jr., R. McCarthy, A. F. Price, Weepah Horton Gold Mines Company, a corporation, Iven T. Jeffries, O. U. Pryce and P. N. Petersen, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed August 23, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 9

MINA H. JOHNSON, SIGMUND BEEL, and A. G. BRODIE,

Appellants,

vs.

F. E. HORTON, FRANK HORTON, JR., R. MCCARTHY, A. F. PRICE, WEEPAH HORTON GOLD MINES COMPANY, a corporation organized and existing under the laws of the State of Nevada, IVEN T. JEFFRIES, O. U. PRYCE, and P. N. PETERSEN,

Appellees.

APPELLANTS' OPENING BRIEF.

MAURICE E. GIBSON,
Crocker First National Bank Building, San Francisco,
Attorney for Appellants.

Subject Index

Table of Authorities Cited

No. 6946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MINA H. JOHNSON, SIGMUND BEEL, and A. G. BRODIE,

Appellants,

vs.

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, WEEPAH HORTON GOLD MINES COMPANY, a corporation organized and existing under the laws of the State of Nevada, IVEN T. JEFFRIES, O. U. PRYCE, and P. N. PETERSEN,

Appellees.

APPELLANTS' OPENING BRIEF.

STATEMENT OF FACTS.

This action was commenced in the District Court of the United States in and for the District of Nevada, in equity. Following the filing of plaintiffs' amended bill of complaint and plaintiffs' supplemental bill of complaint, both by leave of Court, defendants moved to dismiss said amended bill of complaint and supplemental bill of complaint on the following grounds:

I.

It appears upon the face of the amended bill of complaint in the above entitled cause that this suit does not really and substantially involve a dispute or controversy within the jurisdiction of this Court, because the amount in controversy does not exceed the sum of Three Thousand Dollars ($3,000.00), exclusive of interest.

II.

The jurisdictional averment of the amount involved is clearly frivolous, as the amended bill of complaint shows that the matter in controversy is title to corporate offices, and that the same is not reducible to a money valuation.

III.

That said amended bill of complaint fails to state facts sufficient to constitute a cause of action in favor of the plaintiffs and against these defendants or either of them.

IV.

The amended bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against these defendants or either of them.

V.

It appears on the face of said amended bill of complaint that said amended bill of complaint is wholly without equity.

VI.

The amended bill of complaint expressly shows that plaintiff, Mina H. Johnson, has no title to maintain this suit or to any relief against these defendants or either of them by reason of the facts herein alleged, in that it appears from said amended bill of complaint that any stock held by said Mina H. Johnson at the date of the corporate meeting therein mentioned was held by her as an executrix of the Estate of I. H. Johnson, deceased.

which motion was granted by the Court. (Trans. page 49-50.) This is an appeal by plaintiffs from said order of dismissal. (Trans. pages 42-43.)

The facts as stated in plaintiffs' amended bill of complaint are substantially as follows:

Defendant Weepah Horton Gold Mines Company is a corporation organized and existing under the laws of the State of Nevada. True copies of its articles of incorporation and by-laws, as the same existed at all times referred to in plaintiffs' amended bill of complaint and supplemental bill of complaint (other than the purported amendment to said by-laws hereinafter referred to), are appended as exhibits to said amended bill of complaint and incorporated therein by reference. Neither said articles of incorporation nor said by-laws contain any limitation upon the right of the stockholders of said corporation to vote their stock in stockholders' meetings.

On the 22nd day of May, 1929, the then board of directors of said corporation adopted a resolution assessing the stock of the corporation in accordance

with the powers vested in it; and at a subsequent meeting of the board of directors of said corporation held on March 15th, 1932, the then board of directors of said corporation, consisting of defendant F. E. Horton, defendant Frank Horton, Jr., defendant R. McCarthy, defendant A. F. Price, and George C. Keough, adopted a resolution providing that the stock on which said assessment had not been paid on or before April 18th, 1932, would be sold on said last mentioned date; and at said time likewise authorized the payment of defendant F. E. Horton's said stock assessment by crediting him with certain advances alleged to have been made by him for the corporation.

There having been no stockholders' meeting of said corporation for the election of directors since on or about the 1st day of February, 1929, plaintiffs Mina H. Johnson, and A. G. Brodie and other persons, (other than the defendants) all of whom were stockholders in said corporation, jointly called a special meeting of the stockholders of said corporation in accordance with said by-laws for the purpose of electing directors of the corporation for the ensuing year, said meeting being noticed to be held at the office of the corporation in Reno, Nevada, on the 21st day of March, 1932.

At a meeting of the board of directors of said corporation held on March 19th, 1932, consisting solely of defendant F. E. Horton, defendant Frank Horton, Jr., defendant R. McCarthy, defendant A. F. Price, and George C. Keough, a resolution was adopted by said board of directors purporting to change and amend Section 4 of Article 2 of the by-

laws of said corporation by adding the following thereto:

> "No stockholder shall be entitled to vote any shares of stock on which share or shares of stock the or any assessment thereon be due, unpaid, or delinquent, and no shares shall be voted at any meeting of stockholders for the election of directors unless all calls and assessments thereon or against said stock shall be paid on the date and at and prior to the meeting of the shareholders.
>
> At all meetings of stockholders, in order to constitute a quorum, only shareholders who have paid all calls and assessments theretofore levied, shall be considered as shareholders of the company."

Said special meeting of the stockholders for the election of directors was duly held on March 21st, 1932, there being present at said meeting in person and by proxy 1,136,140 shares of the capital stock of said corporation out of a total of 1,168,300 shares of the corporation's stock issued and outstanding, At said meeting defendant F. E. Horton, defendant Frank Horton, Jr., defendant R. McCarthy and plaintiff Mina H. Johnson, plaintiff A. G. Brodie, and plaintiff Sigmund Beel were the only nominees to fill the five directorships. At said meeting 1,021,750 cumulated votes were cast for plaintiffs Mina H. Johnson, A. G. Brodie and Sigmund Beel for directors in said corporation and 774,223 cumulated votes were cast for defendants F. E. Horton, Frank Horton, Jr., and R. McCarthy for directors in said corporation. All but 142,083⅓ votes out of said 1,021,750 votes cast for said three plaintiffs were dis-

regarded and not counted in said election by the inspectors of election appointed by defendant F. E. Horton, who acted as chairman of said meeting, for the alleged reason that said purported amendment to the by-laws disfranchised stock on which said assessment at said time had not been paid. Thereupon defendant F. E. Horton announced that defendants F. E. Horton, Frank Horton, Jr., and R. McCarthy had been elected directors of said corporation and that the two remaining places on said board of directors were vacant.

Plaintiffs Mina H. Johnson, A. G. Brodie, and Sigmund Beel, refusing to accede to this ruling of the chair, and considering that plaintiffs had been elected directors, held the organization meeting of said board of directors immediately after the adjournment of said stockholders' meeting in conformity with Article 5, Section 10 of said by-laws, after announcing to the stockholders' meeting as it was adjourning, that said meeting would be so held; and at said meeting said three plaintiffs being present and acting as directors in said corporation, elected the following officers of said corporation: plaintiff Mina H. Johnson, president; plaintiff Sigmund Beel, vice-president; and plaintiff A. G. Brodie, secretary-treasurer, to serve as such until the election and qualification of their successors in office.

Following said stockholders' meeting defendant F. E. Horton, Frank Horton, Jr., and R. McCarthy purported and are now purporting to act as the board of directors of said corporation to the exclusion of plaintiffs herein and defendants F. E. Hor-

ton, A. E. Price, and R. McCarthy are purporting to act as the president, vice-president, and secretary-treasurer of said corporation, and have retained possession of the books, records, properties, and assets of said corporation and have at all times refused on demand to deliver the same to plaintiffs.

The additional facts stated in the supplemental bill of complaint are substantially as follows:

A special meeting of the three plaintiffs herein as a lawful quorum of the board of directors of said corporation was held on the 16th day of April, 1932, after due notice thereof had been sent by plaintiff A. G. Brodie, acting as secretary, to defendants F. E. Horton, Frank Horton, Jr., and R. McCarthy. At said meeting, which was not attended by any of said defendants, a resolution was adopted by the affirmative vote of all three of said plaintiffs, acting as directors, extending, for a period of ninety days from and after April 18th, 1932, the sale date for said delinquent stock assessments; and notice of this postponement of said sale date, by said plaintiffs acting as the board of directors of said corporation, was given to all defendants prior to 10:00 o'clock A. M. on the 18th day of April, 1932. Notwithstanding this notice of postponement defendants F. E. Horton and Iven T. Jeffries proceeded in the name of the corporation at 10:00 o'clock A. M. on said 18th day of April, 1932, to sell all stock of the company on which said assessment had not been paid at said time. At said sale defendant O. U. Pryce, with notice of said postponement of said sale, purported to buy two thousand shares of said stock; and at said

sale defendant P. N. Petersen, with notice of said postponement, purported to buy three hundred ninety-three thousand shares of said stock, which included one hundred eighty-three thousand shares of said stock of said plaintiffs; and at said sale five hundred forty-three thousand four hundred and ten shares of the stock of said corporation were purported at said time to be retired to the treasury of said corporation.

Based on the foregoing allegations in the amended bill of complaint and supplemental bill of complaint plaintiffs prayed for the relief set forth in the prayers in its amended bill and supplemental bill and the Honorable District Court on motion of appellees' counsel dismissed both bills for want of equity.

ANALYSIS OF FACTS OF CASE.

The important facts of the case can be grouped into two divisions:

(1) At the stockholders' meeting on March 21st, 1932, plaintiffs received the three highest numbers of votes cast for directors and consequently were elected directors of said corporation and defendants F. E. Horton, Frank Horton, Jr., and R. McCarthy received the three lowest numbers of votes cast for the election of the five authorized directors in said corporation, unless said purported amendment to the by-laws of defendant corporation disfranchising stock having unpaid assessments thereon at the time of such meeting was effectual to accomplish such disfranchisement.

(2) If plaintiffs were elected directors at the stockholders' meeting on March 21st, 1932, their action qua directors in the directors' meeting duly noticed and held on the 16th day of April, 1932, at which they extended the sale date for delinquent stock assessments was a valid corporate act binding on the agents of the corporation and those who purchased at the assessment sale with notice thereof.

It is submitted, therefore, that the appeal involves merely two questions of law, viz.:

(1) Does the purported amendment by its directors of the by-laws of a corporation, organized under the laws of the State of Nevada, purporting to disfranchise stock on which an assessment is delinquent, prevent said stock from being voted at a stockholder meeting of said corporation, there being nothing in the articles of incorporation or by-laws of said corporation in derogation of the right of all outstanding stock to be voted at such meetings and the by-laws merely giving the directors the right to amend the by-laws?

(2) Does a bill of complaint state a cause of action in equity, which

(a) Sets forth in substance that a minority of the stockholders of a Nevada corporation have attempted by an illegal and ineffectual by-law, adopted by themselves as directors, to prevent the majority of the stockholders of said corporation from electing a controlling number of its directors, and

(b) Which sets forth that certain defendants purporting to act as officers of the corporation have pur-

ported to sell to third parties, with notice, and retire to the treasury 543,410 shares of the outstanding stock of the corporation, including the stock of the plaintiffs, in contravention of a postponement of the sale date of said stock by a quorum of its *de jure* directors by resolution in a directors' meeting properly noticed and held, and

(c) Which states that certain of the defendants who were not *de jure* officers or directors are purporting to act as the sole officers and the sole directors of said corporation and are carrying on the business of the corporation and withholding its property, books, assets, and records from its *de jure* officers and directors, and

(d) Which prays for a receiver; an injunction against their so acting; the delivery of the property, books, and assets of said corporation to said receiver; the expunging of said illegal by-law from the by-laws of the corporation; the adjudication that plaintiffs are *de jure* directors and officers, and that the defendants, acting as such are not; the removing of the cloud on the title to the stock purported to have been sold by certain of said defendants for said delinquent assessments; and for such further relief as to the Court seems proper?

Appellants contend:

(1) That the purported amendment to the by-laws was null and void and of no effect at the stockholders' meeting; that consequently plaintiffs were elected directors at said meeting and now constitute three of the five authorized directors of said corporation; and

that by virtue of the proceedings taken by them at the organization meeting, plaintiffs were elected respectively president, vice-president, and secretary-treasurer of said corporation and now are its *de jure* officers, and

(2) That said amended bill of complaint and supplemental bill of complaint state a cause of action in equity, for the reason that their remedy at law is neither plain, adequate, nor complete.

(3) That the Honorable District Court erred in dismissing the amended bill of complaint and supplemental bill of complaint.

Before considering the foregoing two main points of this brief it is desirable to comment briefly on two objections to the amended bill of complaint and supplemental bill of complaint made by appellees on their motions to dismiss, to-wit:

1. That it does not appear the value of the matter in dispute is in excess of $3000.00, and

2. That plaintiff Mina H. Johnson has no title to maintain this suit.

Plaintiffs have alleged that the value of the mining claims owned by the corporation in the State of Nevada is in excess of $3000.00, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3000.00. (Paragraphs 1 and 9, amended bill of complaint; Trans. page 2.)

For the purpose of the jurisdictional prerequisite as to the amount in controversy the value of the entire corporate assets is deemed to be involved in an action of this character and the foregoing allega-

tions as to the amount in controversy are sufficient for the purposes.

Klein v. Wilson & Co., 7 Fed. (2nd) 772;
Local No. 7 Bricklayers' Union v. Brown, 278 Fed. Rep. 271;
Presto-Lite Company v. Bournonville et ux., 260 Fed. Rep. 440.

With respect to complying with Equity Rule 27, it need only be observed that this is not a stockholders' bill. The relief sought is based on plaintiffs' rights as directors and officers of the corporation as the representatives of a majority of the stockholders of the corporation.

I.

THE PURPORTED AMENDMENT TO THE BY-LAWS WAS NULL AND VOID AND OF NO EFFECT.

All stockholders in Nevada corporations have the right to vote their stock in stockholder meetings unless the articles of incorporation provide otherwise. On this point Section 28 of Nevada Corporation Act provides:

> "Unless otherwise provided in the *certificate* or *articles of incorporation,* or an *amendment thereof,* every stockholder of record of a corporation shall be entitled at each meeting of stockholders thereof to one vote for each share of stock standing in his name on the books of the corporation";

and

Section 30 of said act provides for cumulative voting for directors when authorized by the articles of incorporation, as in the instant case.

The articles of incorporation of defendant corporation contain no limitation on the right of stockholders in the corporation to vote the stock standing in their names.

The attempt by defendants to amend the by-laws of defendant corporation to prohibit holders of stock on which assessments were delinquent from voting such stock at stockholders' meetings was a nullity and void act because of being in contravention of Section 8, subdivision 6, of Nevada Corporation Act, which provides as follows:

> "Sec. 8. Every corporation, by virtue of its existence as such, shall have power:
>
> "6. To make laws *not inconsistent* with the constitution or laws of the United States, *or of this state,* for the management, regulation and government of its affairs and property, the transfer of its stock, the transaction of its business, and the calling and holding of meetings of its stockholders."

Lilylands Canal & Reservoir Co. v. Wood (Colo.), 136 Pac. Rep. 1026;

Peoples' Home Savings Bank v. Superior Court, 104 Cal. 649, 38 Pac. Rep. 452, 43 Am. St. Rep. 147, 29 L. R. A. 844;

Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237;

Fletcher on Corporations, Vol. 1, Sec. 29,

wherein it is stated:

> "In order to be valid by-laws must be consistent with the law of the land. Accordingly a by-law is void if it is in contravention of any provision of the Federal or State Constitution, or of any Federal or State Statute."

The non-payment of an assessment does not affect a stockholder's right to vote prior to the sale of the delinquent stock.

Nevada Corporation Act, Sec. 74;
14 *Corpus Juris* 902, Sec. 1392.

II.

THE AMENDED BILL OF COMPLAINT AND SUPPLEMENTAL BILL OF COMPLAINT STATE A CAUSE OF ACTION IN EQUITY.

Appellees have taken the position that plaintiffs' case presents merely a question as to the title to corporate offices; that, for this reason no question of equitable cognizance or jurisdiction is presented and that appellants should be relegated to a Court of law, there to *sue in quo warranto* to determine the same. Appellants cannot concur in this attempted narrowing of the propositions confronting the Court. Something more than the mere title to corporate offices is involved in this case. In substance the question is whether the defendant corporation is to be run and managed by the selected representatives of a majority of the stockholders as provided by the laws of the state of incorporation, or whether a minority group will be permitted to maintain and perpetuate itself in office and in control of the corporation in absolute contravention to the express laws of the State of Nevada.

If appellants should be denied equitable relief the appellees would be free to run the corporation, formulate its policies, issue stock, execute contracts, incur

indebtedness, and in general to conduct the affairs of the corporation, while the appellants and the majority of stockholders would be compelled helplessly to stand by impotent to interfere with the usurpation of control by the minority until such time as a Court of law, through successive appeals perhaps, had determined merely the bare title to office. Appellees argued in the lower Court that a Court of equity was thus closely confined and their motion for the dismissal of plaintiffs' amended bill and supplemental bill was granted on that narrow ground.

We do not concur in appellees' view of the scope of equity jurisdiction as applied to the present situation. We submit that the determination of the respective titles to office is only one of the questions involved, as a reading of the amended bill and supplemental bill and the relief prayed for therein will disclose. A statement of the Court in *Westside Hospital v. Steele,* 124 Ill. App. 534, expresses appellants' views in the matter:

> "It is urged on behalf of appellants that the main, if not the only, question presented by the bill of complaint is the validity of the election of the president and treasurer of the corporation at the directors' meeting of January 10, 1906; and that a court of equity will not entertain jurisdiction of a suit, the purpose of which is merely to test the legality of the election or the removal of officers of a corporation. As to the principle of law involved in this contention we have no dissent to express—we cannot, however, agree with counsel in their statement of the case presented by the bill. As we view it, the case stated in the bill is not merely one involving the va-

lidity of an election of officers, but it involves the rights of minority stockholders of the corporation under the constitution and laws of this state to have an annual meeting of directors held according to law, and to cumulate their votes at such an election; and that the officers and management of the corporation shall only be installed in control of the corporation and its property and business, by, through, and in compliance with the law, and the legal by-laws of the corporation. The minority stockholders of a corporation have property rights in the corporation and its assets and management, which the directors, their trustees, may not ignore and set aside, nor can the majority of the stockholders, broad as their powers are, override the organic law of the corporation for the illegal purpose of preventing the minority from securing the representation in the directory which the shares of stock owned by them enable them to elect.

"The acts of the defendants to the bill resulted in putting the business and property and funds of the corporation in the hands of men who are not legally entitled to act for the corporation. The contention of appellants is that there is an adequate remedy at law for the situation shown in the bill, by quo warranto. We do not think so. As said in Bartlett v. Gates, 118 Fed. Rep. 66: 'The stockholders of this corporation are legally entitled to have a meeting of stockholders called, at which they can express their choice for directors of the company. The complainants' remedy at law is not adequate. The remedy at law would leave the parties free to renew the contest on the same and other like lines that have thus far stifled the voice of the stockholders.' See also Dodge v. Woolsey, 59 U. S. 331."

The case of *Johnstone v. Jones,* 23 N. J. Eq. 216, involved a secret stockholders' meeting. In that case the Court said:

> "If a dissatisfied director of one of our large railroad corporations could persuade a town meeting to elect new directors of his company, or was to assemble on such day as he chose to name two of its stockholders, and persuade them to vote on the whole stock of the company instead of twenty shares held by them, for himself and his associates on the ticket named by him, and they were to meet, elect officers, produce and adopt books and attempt to seize by force the road and its equipment they would be as much officers de facto and de jure as these defendants. No one would contend that a court of equity could not restrain, by injunction, such raids as these, but is obliged to leave the corporation and its lawful directors to the remedy at law, always taking at least months and in the meantime suffer the road to be operated and perhaps ruined by the depredators, because they claim to be directors de facto or de jure. A court of equity that could hesitate in such a case would be of little use."

The rule is undoubtedly correctly stated in *Fletcher Cyc. Corporations,* Vol. 5, Sec. 2070, commencing at page 234, as follows:

> "On general principles, a court of equity has no jurisdiction to determine as a principal object of the bill the illegality of an election and remove or seat officers, when there is an adequate remedy by quo warranto, mandamus, or under a statute, unless such jurisdiction has been conferred by statute. A court of equity, however, has jurisdiction to inquire into the validity of an election,

and to declare it void, when necessary to the complete adjudication of a cause over which it has jurisdiction on independent grounds, as where an injunction is necessary to prevent waste or misappropriation of the corporation funds or destruction of the corporate business, or unwarranted interference with its management and business affairs to its manifest detriment, or where a fraud is being perpetrated and cannot be prevented except by a court of equity, or where there has been a breach of trust, or where an accounting is proper, or where property rights and incidentally office rights are involved," etc.

There is no controlling statute in the instant case. It is submitted, however, that the instant case brings itself within some of the foregoing exceptions noted by Fletcher, for the reasons that:

1. The action of the defendants as a minority group in attempting to perpetuate themselves in office by means of an illegal by-law adopted by them two days before the stockholder meeting in question constituted and continues to constitute a fraud on the majority stockholders of the corporation giving an independent ground for equity jurisdiction.

Humboldt Driving Park Assn. v. Stevens, 34 Neb. 528, 52 N. W. 568, 33 Am. St. Rep. 654;
Johnstone v. Jones, supra;
Westside Hospital of Chicago v. Steele, supra;
Schmidt v. Pritchard, 135 Iowa 240, 112 N. W. 801;
Singer Mfg. Co. v. Yarger (C. C. Iowa, 1880), 12 Fed. 487;
Walker v. Johnson, 17 App. (D. C.) 144;
Hughes Fed. Practice, Vol. 2, Sec. 960.

2. The expunging of the illegal by-law from the by-laws of the corporation is an independent ground of equity jurisdiction.

Lutz v. Webster, 249 Pa. 226, 94 Atl. 834;
Westside Hospital of Chicago v. Steele, supra.

3. The right of a corporation through its duly elected directors and officers to control and have possession of its property, records, and other assets is a valuable property right which equity will protect.

Society of Mutual Succor St. Mary of Lattini of Rocca-Monfina v. Iacobe et al., 232 Mass. 263, 122 N. E. 292;
Hughes Fed. Practice, Vol. 2, Sec. 972;
International News Service v. Associated Press (1918), 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211.

In addition thereto the clearing of the cloud on the stock purported to have been sold for delinquent assessments is a matter of independent jurisdiction in equity.

Hughes Fed. Practice, Vol. 2, Sec. 974;
Shaniwald v. Lewis, 5 Fed. 510 (District Court Nevada 1880).

4. The appointment of a receiver for the assets of a corporation and the issuance of an injunction are still further grounds for independent jurisdiction in equity.

Hughes Fed. Practice, Vol. 2, Secs. 1027, 1028 and 1142.

The true equity rule is thus laid down by Story's Equity Jurisprudence (Sec. 33):

> "The remedy must be plain, for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for, if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party, in a perfect manner, at the present time, and in future; otherwise equity will interfere, and give such relief and aid as the exigency of the particular case may require."

Tested in the light of this definition the remedy at law in the case at bar would fall short of measuring up to this rule, for such a remedy would be neither plain, adequate, nor complete.

For these reasons it is respectfully submitted that the judgment of the Honorable District Court should be reversed.

Dated, San Francisco,
December 23, 1932.

Respectfully submitted,
MAURICE E. GIBSON,
Attorney for Appellants.

No. 6946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

10

MINA H. JOHNSON, SIGMUND BEEL, and A. G. BRODIE,

Appellants,

vs.

F. E. HORTON, FRANK HORTON, JR., R. MCCARTHY, A. F. PRICE, WEEPAH HORTON GOLD MINES COMPANY, a corporation organized and existing under the laws of the State of Nevada, IVEN T. JEFFRIES, O. U. PRYCE, and P. N. PETERSEN,

Appellees.

Notice of Motion to Dismiss Appeal

Motion to Dismiss Appeal

Points and Authorities on Motion to Dismiss Appeal

Answering Brief of F. E. Horton, Frank Horton, Jr., R. McCarthy, A. F. Price and Weepah Horton Gold Mines Company, a corporation, Appellees

THATCHER & WOODBURN,
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Reno National Bank Building,
Reno, Nevada
Attorneys for Appellees.

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Appellees.

NOTICE OF MOTION TO DISMISS APPEAL

To Appellants above named, and

To M. E. Gibson, Counsel for appellants:

PLEASE TAKE NOTICE that upon the record and proceedings in this cause filed in this Court, and upon the records and proceedings now on file in this Court in a second appeal prosecuted in said case and filed in the above entitled Court on the 24th day of October, 1932, appellees, F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE and WEEPAH HOR-

TON GOLD MINES COMPANY, a corporation, will move the above entitled Court, at the courtroom thereof in the City of San Francisco, State of California, on the 19th day of January, 1933, at the hour of 10 o'clock A. M. for an order dismissing the appeal in the above entitled cause and for such further relief as to the Court may seem fit and proper.

A copy of said motion and of the brief in support thereof is annexed hereto and herewith served upon you.

DATED this 10th day of January, 1933.

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellees,

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation.

No. 6946

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Appellees.

MOTION TO DISMISS APPEAL

COME NOW the appellees, F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE and WEEPAH HORTON GOLD MINES COMPANY, a corporation, and move this Honorable Court to dismiss the appeal herein upon the ground that the order appealed from is not a final judgment, decree or order, so as to be appealable.

The appeal herein is taken from an order of the District Court of the United States, in and for the

District of Nevada, sustaining a motion to dismiss the amended bill of complaint and dismissing said amended bill of complaint and the supplemental bill of complaint on file therein. Said order appears on pages 59 and 60 of the Transcript of the Record and is not a final judgment, decree or order so as to be appealable, but is simply a dismissal of certain pleadings in the case and did not constitute a final determination of the rights of the parties, as is evidenced by the filing of a second bill in this Court from an order entered in the same case, dismissing a subsequent and second supplemental bill of complaint filed therein after the taking of this appeal. The Transcript of the Record in said second appeal was filed in this Court on the 24th day of October, 1932.

WHEREFORE appellees above named move this Court that said appeal be dismissed and they have their costs in this behalf expended.

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellees,

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation.

No. 6946

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Appellees.

POINTS AND AUTHORITIES ON MOTION TO DISMISS APPEAL

The appellees who have appeared in this case are F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE and WEEPAH HORTON GOLD MINES COMPANY, a corporation. They have filed herein a motion to dismiss the appeal on the ground that the order appealed from is not such a final determination of the rights of the parties involved as to be appealable. The order appealed from is contained on pages

59 and 60 of the Transcript of the Record, and omitting the caption, reads as follows:

> "Defendants' motion to dismiss plaintiffs' amended bill of complaint herein having heretofore been argued, submitted and taken under advisement, IT IS NOW BY THE COURT ORDERED that the said motion to dismiss the amended bill of complaint be, and the same is hereby granted; and the amended bill of complaint and supplemental bill of complaint are hereby dismissed. The Court reserves the right to file written opinion herein later."

The position taken by appellees herein is that this order constitutes nothing more than an order dismissing certain pleadings and is in no sense a final determination of the case, and that there being no final judgment or decree contained in the record, this case is not one within this Court's appellate jurisdiction.

This Court has held in the case of

> *City and County of San Francisco v. McLaughlin, Collector of Internal Revenue, et al.*
> 9 Fed. (2nd) 390,

as follows:

> "Equity rule 29 abolishes demurrers and pleas, and provides that every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss, or in the answer. The mere granting of a motion to dismiss under this rule, unless followed by a final decree,

amounts to nothing more than a determination on the part of the court that the bill is open to one or more of the objections urged against it, and the order on the motion is not final, any more than is an order sustaining a demurrer to a complaint in an action at law. In either case the suit or action is still pending, and must be determined by final decree or judgment before this court can acquire jurisdiction by appeal or writ of error. Schendel v. McGee (C.C.A.) 300 F. 273, 277; Pierce v. National Bank of Commerce (C.C.A.) 282 F. 100; G. Amsinck & Co. v. Springfield Grocer Co. (C.C.A.) 7 F. (2nd) 855."

Also, a somewhat similar question was presented in the case of

Dyar vs. McCandless, 33 Fed. (2nd) 578,

which involved an appeal from an order striking out an answer and conditionally holding plaintiff entitled to judgment. The Court therein held as follows:

"The first question which arises is whether the order was appealable. If it was not, this court has no jurisdiction. It is the duty of the court to determine this jurisdictional question. City and County of San Francisco v. McLaughlin (C.C.A.) 9 F. (2d) 390; Highway Const. Co. v. McClelland, 14 F. (2d) 406 (C.C.A.8); Equitable Life Assur. Soc. v. Rayl, 16 F. (2d) 68 (C.C.A.8).

It is well settled that an order sustaining a demurrer to a complaint, or granting a motion to dismiss a complaint, without entry of judgment, is not a final order within the meaning of section 128, Judicial Code (28 USCA Sec. 225). Clark v. Kansas City, 172 U.S. 334, 19 S. Ct. 207, 43 L. Ed.

467; Missouri, etc. Ry. Co. v. Olathe, 222 U. S. 185, 32 S. Ct. 46, 56 L. Ed. 155; Morris v. Dunbar (C.C.A.) 149 F. 406; Dickinson v. Sunday Creek Co. (C.C.A.) 178 F. 78; J. W. Darling Lumber Co. v. Porter (C.C.A.) 256 F. 455; City and County of San Francisco v. McLaughlin, supra."

Under the authorities above quoted, if the order in the present case amounts to nothing more than the sustaining of a motion to dismiss or the striking out of certain pleadings, it is not such a final judgment as to be within the appellate jurisdiction of this Court. Under the peculiar facts of this case, it is appellees' contention that such order was not a final judgment, but simply dismissed certain pleadings without cutting off the right to file amended pleadings. The records of this Court show that, in fact, further pleadings were filed in the lower court and they were afterwards dismissed. The order here appealed from was not treated either by the appellants herein or the District Court as amounting to a final determination of the rights of the parties, but amounted to nothing more than a holding that the pleadings were defective as they then stood.

The appeal filed in this Court on the 24th day of October, 1932, shows that subsequent to the taking of this appeal, the appellants appeared in the District Court and filed therein their second supplemental complaint; that a motion to dismiss was directed at the second supplemental complaint and a hearing had thereon, and the second supplemental complaint was subsequently dismissed and an appeal taken to this Court from that order.

The authorities all recognize that the reason for giving this Court appellate jurisdiction only in cases of appeals from a final judgment or decree was to prevent the practice here attempted, that is, to prevent bringing appeals to this Court by piecemeal. It was never intended that each time a demurrer or motion was sustained or granted affecting certain pleadings in a case, that an appeal might be taken and thereafter subsequent pleadings filed and new appeals taken when they were disposed of. The present case involves simply an attempt to bring at least two appeals to this Court in the same case where one would suffice after a final decree or judgment had been entered by the District Court. There can be no doubt, under the ruling of this Court in City and County of San Francisco v. McLaughlin, supra, that the mere granting of a motion to dismiss is not construed as an appealable order.

It may be argued, however, that by the lower court adding the words "and the amended bill of complaint and supplemental bill of complaint are hereby dismissed" the Court thereby entered a final decree in the case.

The second appeal and the Transcript of the Record therein, however, now on file in this Court, show that said order was never so treated, either by the appellants or the District Court, and was treated merely as

an interlocutory order, not disposing of the action, but simply dismissing *certain pleadings*.

For the foregoing reasons, the appeal herein should be dismissed.

Respectfully submitted.

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellees,

F. E. HORTON, FRANK HORTON, JR., R. MCCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation.

No. 6946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MINA H. JOHNSON, SIGMUND BEEL, and A. G. BRODIE,

Appellants,

vs.

F. E. HORTON, FRANK HORTON, JR., R. MCCARTHY, A. F. PRICE, WEEPAH HORTON GOLD MINES COMPANY, a corporation organized and existing under the laws of the State of Nevada, IVEN T. JEFFRIES, O. U. PRYCE, and P. N. PETERSEN,

Appellees.

ANSWERING BRIEF OF

F. E. Horton, Frank Horton, Jr., R. McCarthy, A. F. Price and Weepah Horton Gold Mines Company, a Corporation, Appellees.

STATEMENT OF FACTS

The appellees above named are the only parties defendant who have appeared in this action, and will be hereinafter referred to as the appellees.

This action was commenced in the District Court of the United States, in and for the District of Nevada,

in equity, by the filing of a bill of complaint. Thereafter an amended bill of complaint (Tr. pages 1-50) was filed by the plaintiffs against the appellees. This amended bill of complaint in substance alleged that the plaintiffs were citizens of the State of California; that the individual defendants were citizens of the State of Nevada, and that the defendant corporation was a Nevada corporation, owning mining claims in Nevada whose value exceeded Three Thousand Dollars ($3,000.-00). (Tr. pages 1-3).

That on or about the 19th day of March, 1932, the then directors of the defendant corporation enacted a by-law prohibiting the voting of any shares of stock for the election of directors of the corporation unless all calls and assessments on said stock should be paid prior to the meeting of the shareholders. (Tr. page 6). That a stockholders meeting was thereafter held on the 21st day of March, 1932, and that certain stockholders who had not paid the assessment theretofore levied upon their stock voted for the plaintiffs for directors of the corporation; that the officers of the meeting refused to count such votes but, following the provision of the by-law, declared the individual defendants herein elected directors of the defendant corporation. (Tr. pages 6-11).

It is further alleged that by the votes cast by the stockholders who had failed to pay their assessment, the plaintiffs herein were entitled to become directors of the corporation and to control it; (Tr. pages 9-10); that the by-law enacted by the corporation was invalid and that therefore the plaintiffs are the legally elected

directors of the defendant corporation and that the defendants Horton, Price and McCarthy are in possession of the books, records and properties of the corporation and have refused to deliver them to the plaintiffs, although demand has been made therefor. (Tr. pages 10-11).

The prayer of this complaint (Tr. pages 11-12) asked

(a) That a receiver be appointed to take charge of the books and property of the defendant corporation;

(b) That the individual defendants be restrained from exercising the functions of directors and officers in the defendant corporation;

(c) That the defendants be directed to deliver to the receiver the books and property of the defendant corporation;

(d) That the pretended election of the individual defendants as directors of the corporation be declared void;

(e) That any pretended election or purported office holding of the individual defendants be declared void;

(f) That the purported amendment to the by-laws be declared void;

(g) That plaintiffs be declared legally elected directors of the defendant corporation;

(h) That plaintiffs be declared the legally elected

and acting officers of the defendant corporation.

To this amended bill of complaint appellees herein filed a motion to dismiss (Tr. pages 48-50) upon the grounds

(1) That the District Court did not have jurisdiction because the amount in controversy did not exceed $3,000 and that the matter in controversy was title to corporate offices and that the same was not reducible to a money valuation;

(2) That the amended bill of complaint failed to state a cause of action in favor of plaintiffs and against defendants or either of them;

(3) The amended bill of complaint did not state facts sufficient to constitute a cause of action in equity against defendants or either of them;

(4) That it appears on the face of the amended bill of complaint that it was wholly without equity;

(5) The amended bill of complaint showed that the plaintiff, Mina H. Johnson, had no title to maintain the suit by reason of the fact that it appeared that any stock held by her at the date of the corporate meeting was held by her as executrix of the estate of I. H. Johnson, deceased.

Thereafter, and on the 27th of June, 1932, a supplemental bill of complaint (Tr. pages 51-59) was filed in

the case, alleging in substance that the defendants in the suit had sold all stock on which the assessment had not been paid to O. U. Pryce, P. N. Petersen and the defendant, Weepah Horton Gold Mines Company. (Tr. pages 55-57). That prior to such sale the plaintiffs had held a meeting in San Francisco, California, and extended the period for the sale of delinquent stock for a period of ninety (90) days from and after April 18, 1932. (Tr. page 54). The plaintiffs asked for a decree by this supplemental complaint declaring the sales of stock void, and asked for a decree removing the cloud on the title of said stock. (Tr. page 58).

O. U. Pryce, P. N. Petersen and Iven T. Jeffries were made additional defendants in the supplemental complaint. Neither of these parties, however, has ever been served or appeared in the action.

It appears from the Transcript of the Record, page 55, that P. N. Petersen purchased the stock of the plaintiffs herein, including the stock of I. H. Johnson, the I. H. Johnson stock being that claimed by the plaintiff, Mina H. Johnson, as executrix of the Estate of I. H. Johnson, deceased.

The motion to dismiss plaintiffs' amended bill of complaint came on for hearing on June 27th, 1932, (Tr. pages 50-51), and thereafter the Court entered its order granting the motion to dismiss the amended bill of complaint and dismissing the amended bill of complaint and the supplemental complaint. (Tr. pages 59-60). The appeal herein is taken from such order.

Questions Involved

The appeal in this case involves what may be considered as four distinct questions, as follows:

1. Is the controversy involved in the present suit such that it can be ascertained in money to meet the jurisdictional amount in the United States District Court?

2. Are the facts stated in the amended bill of complaint sufficient to state a cause of action for equitable relief?

3. Are the facts stated in the supplementary bill of complaint sufficient to state a cause of action for equitable relief?

4. Is the by-law complained of invalid?

Upon the determination of these four questions depends appellants' right to a reversal of the order of the District Court.

Is the Matter in Controversy in the Present Suit Ascertainable in Money so as to Have Conferred Jurisdiction upon the District Court.

In the District Court, one of the grounds of the motion to dismiss was that the jurisdictional averment in the complaint that the suit involved an amount in excess of $3,000 was frivolous, in that the amended bill of complaint showed on its face that the matter in controversy was the title to corporate offices and not such a matter as could be ascertainable in money, and therefore not within the jurisdiction of the District Court.

It is now universally held that in order to give a District Court of the United States jurisdiction over a controversy between citizens of different states, the matter in controversy must be such as can be calculated and ascertained in money sufficient to meet the jurisdictional amount. See

Greenough v. Independent Lead Mines Co. et al., 45 Fed. (2nd) 659;

Whitney v. American Shipbuilding Co., 197 Fed. 777;

In re Red Cross Line, 277 Fed. 853.

The cases last cited involved the right to inspect corporate books and in all of the cases it was held that such a right is not one which could be reduced to a money valuation and therefore the Court had no jurisdiction of the controversy.

In the present suit the right sought to be enforced is a declaration by a court of equity that the defendants are not the officers of the defendant corporation and that plaintiffs are legally elected directors thereof. This is a controversy over the title to corporate offices, and involves nothing more. The right to an office is not a right that can be reduced to a money valuation, even though one of the incidents to the office is the exercise of control over property, the valuation of which may exceed the jurisdictional amount.

The Supreme Court of the United States, in the case of

DeKrafft v. Barney, 2 Black 704, 17 L. Ed. 350,

had before it an appeal which involved the right to act

as a guardian over the person and estate of a minor child. The Supreme Court, in passing upon the question, held as follows:

> "This case cannot be distinguished from the case of Barry v. Mercein, 5 How. 103. The controversy in that case was between a husband and his divorced wife, respecting the guardianship of a child of the marriage who was still an infant.
>
> They were living apart, and each of them claimed the right to the guardianship. And after full argument, the court held that in order to give this court jurisdiction under the 22d section of the Judiciary Act of Sept. 24, 1789, ch. 20 (1 Stat., 73), the matter in dispute must be money, or some right, the value of which could be calculated and ascertained in money. And as the matter in controversey between the parties was not money, nor a right which could be measured by money, but was a contest between the father and mother of the infant upon other considerations, the appeal was dismissed for want of jurisdiction.
>
> In the case before the court, it is admitted that DeKrafft, the appellant, has no pecuniary interest in the controversy. He appears as prochein ami for the children of Barney, whose wife is dead, and from whom the children inherited a large property. DeKrafft alleges that Barney, from his character and habits, is unfit to be trusted with the guardianship of the persons or property of his children, and prays that some other persons suitable and trustworthy may be appointed by the Orphans' Court. The guardianship of the persons and property of the children is, therefore, the only matter in dispute, not on account of any pecuniary value at-

> tached to the office, but upon other considerations. The case is the same in principle with that of Barry v. Mercein, above referred to, and the appeal to this court, for the same reason, must be dismissed for want of jurisdiction."

The foregoing case involved the right of the Supreme Court to exercise its appellate jurisdiction in cases where the right was not one reducible to a valuation in money. The situation is analagous to the case at bar in that in the case cited the right sought to be enforced was also the right to an office, namely that of guardian. In the present suit the plaintiffs are attempting to enforce a similar right in asking that their right to be and act as directors of a corporation be enforced. In this connection, it must be observed that this suit is not in the nature of a stockholders bill to enforce the rights of the plaintiffs as stockholders, but, quoting from appellants' opening brief, "the relief sought is based on plaintiffs' rights as directors and officers of the corporation as the representatives of a majority of the stockholders of the corporation". In appellants' opening brief it is contended that in the present suit the value of the assets of the corporation must be taken to be the matter in dispute and that the amended bill of complaint shows that the value of the corporate assets is in excess of the sum of $3,000.00. The bill of complaint, however, demonstrates that the controversy involved here is not a controversy over certain property but solely a contest over the right to an office or offices to which the right to act in a fiduciary capacity in controlling certain property is only an incident.

The cases cited in appellants' opening brief in support of their position here are

Klein v. Wilson & Co., 7 Fed. (2nd) 772;

Local No. 7 Bricklayers Union v. Brown, 278 Fed. Reporter 271;

Presto-Lite Co. v. Bournonville, et ux, 260 Fed. Reporter, 440.

The case of Klein v. Wilson & Co., supra, involved a suit by a stockholder on behalf of all the other stockholders to determine the corporation's solvency and distribute its assets through the agency of a receivership. The Court held that the value of the corporation's assets was the property in dispute. Clearly the amount involved was the entire assets of the corporation. The case is not, however, analagous to the situation in the case at bar, where the plaintiffs are seeking simply to be restored to certain offices of the corporation.

Local No. 7 Bricklayers Union v. Brown, supra, was an application for an injunction to restrain the defendants from putting into effect a judgment issued by the executive board of the union suspending the plaintiffs from membership in the bricklayers, masons and plasterers union. Apparently no question was raised as to the value of the memberships of the members being worth more than $3,000, and the Court held that this was a class suit and the aggregate interests of the whole class constituted the matter in dispute, and these interests exceeded in value the sum of $3,000. It was also held by the Court in such case that while the jurisdiction of the court was attacked on the ground that the

case did not involve property, that this contention was no longer available since the defendants had voluntarily answered in the case.

The case of Presto-Lite Company v. Bournonville, supra, is in no way analagous to the case at bar, but was an action by a certain corporation seeking an injunction against the selling of certain products bearing the plaintiff's trademark. The trademark was property which exceeded in value the jurisdictional amount and the injunction sought to protect this property right.

It will be noted in this connection that it is not alleged in the pleadings in the case at bar that the defendants herein were injuring the property of the corporation or threatening to do so, nor is there any allegation that the value of any of the corporation's property was being impaired by the acts of the defendants in acting as directors of the defendant corporation.

The entire matter involved in this controversy is the right to certain offices and no contention is made that they are of any particular pecuniary value. The relief sought is to place the plaintiffs in such offices and remove the individual defendants therefrom. This is clearly a right not reducible to or ascertainable in money.

Are the Facts Stated in the Amended Bill of Complaint Sufficient to State a Cause of Action for Equitable Relief.

As heretofore pointed out in the statement of facts, the amended bill of complaint simply charges that the defendants, by the passing of a by-law which is alleged to be invalid, deprived the plaintiffs of the right to act as corporate directors of the defendant corporation, and further alleged that the individual defendants were in charge of the corporation's books and property. It is the contention of the defendants herein that such statement of facts is not sufficient to warrant the equitable relief demanded in the amended bill of complaint, or any other equitable relief.

It is well settled now by the overwhelming weight of authority that a court of equity has no inherent jurisdiction to deal with the question of corporate elections. A few of the leading cases on this subject are as follows

Hayes v. Burns, 25 Appeal Cases, District of Columbia, 242, Affirmed 201 U. S. 650, 50 L. Ed. 905;

New England Mutual Life Ins. Co. v. Phillips, (Mass.) 141 Mass. 535, 6 N. E. 534;

Grant v. Elder, 64 Colo. 104, 170 Pac. 198;

Cella v. Davidson, (Penn.) (June 27, 1931) 156 Atl. 99;

Fletcher Cyclopedia on Corporations, Volume 3, Section 1828.

This general principle is apparently based on two

grounds; first, that there is an adequate remedy at law by quo warranto or mandamus to enforce the right; second, the right to an office is a personal right, and not a property right with which equity alone deals.

The Supreme Court of the United States has, in at least two instances, held that a right to a political office is not one which equity can enforce, for the reason that equity deals only with property rights, and the right to an office is not such a right. See

White v. Berry, 171 U. S. 366, 43 L. Ed. 199;

White v. Butters, 171 U. S. 379, 43 L. Ed. 204.

Apparently the appellants herein admit the general principle to be correct that equity has no jurisdiction to determine the right to a corporate office, but state their position on page 14 of Appellants' Opening Brief as follows:

> "Appellants cannot concur in this attempted narrowing of the propositions confronting the Court. Something more than the mere title to corporate offices is involved in this case. In substance the question is whether the defendant corporation is to be run and managed by the selected representatives of a majority of the stockholders as provided by the laws of the state of incorporation, or whether a minority group will be permitted to maintain and perpetuate itself in office and in control of the corporation in absolute contravention to the express laws of the State of Nevada."

We believe that the portion of the brief of appellants above quoted is stating in another form that all that is involved in this case is the question—who is going to

control the defendant corporation? How, or in what manner this involves any further question than the title to corporate offices we are unable to comprehend. An analysis of the facts of the complaint and the relief prayed for conclusively shows that the only right sought to be enforced here is the right to a corporate office. The amended bill of complaint prays, first, that a receiver be appointed to take charge of the books and property of the defendant corporation, with the usual powers of a receiver in like cases. No reason is given why a receiver should be appointed other than that the defendants be compelled to turn the property over to such receiver.

The remedy by receivership is an ancillary one and cannot be granted where the bill prays for no ultimate relief which the court could grant; in this case the ultimate relief asked is the determination of the title to corporate offices, which the court of equity has no jurisdiction to grant. The application for a receivership, not for the purpose of winding up the affairs of the corporation but simply to hold the property until the title to the offices is determined, would not change the character of this action to one which equity could exercise its jurisdiction. See

Brictson Mfg. Co. v. Close, et al, 280 Fed. 297.

> "Again an application for a receiver is an ancillary remedy, brought with the purpose of incidently aiding in the procurement of other ultimate relief. It seeks to preserve the corpus pending judicial determination of the rights of the litigants,

which must be appropriately sought in the pending cause."

The amended bill of complaint further asks that an injunction be issued restraining the individual defendants from exercising the powers and functions of officers or directors in the defendant corporation. As heretofore pointed out, this is a question wholly without the jurisdiction of equity, and is sought simply as an aid to secure the possession of the offices by the plaintiffs. See

Kean et al.v. Union Water Co. 52 N. J. Eq. J. 13, 31 Atl. 282,

holding:

"Looking at the bill before us in its general aspects, it presents to our view neither more nor less than a controversy between two rival sets of directors of the corporate defendant, each claiming to be its legal representative, having as such the right to exercise the functions appertaining to their office. This is the sole ground on which jurisdiction over the case in hand can be claimed, for there are no other facts stated in the bill which even tend to strengthen, in this particular, the complainant's position. . . The status of these parties is this: Each contends that the election of directors relied upon by his opponent is invalid for the want of a legal organization of the corporate body at the time of choosing, respectively, such officers. No one who examines the case with the least care can have any doubt upon this subject. There is no ground nor hint of any adventitious circumstance laying a further jurisdictional foundation. If, therefore, the court of chancery had rightful cog-

> nizance of the controversy before us, it was because that court has the power to arbitrate between rival claimants to corporate office. . . This doctrine is not only explicitly stated, but is just as explicitly enforced, by decree in the case of Owen v. Whitaker, 20 N. J. Eq. 122.
>
> . . . . Nor is there a particle of doubt with respect to what Chancellor Zabriskie, who decided the case, considered the issue before him, nor with respect to the rule that was applied in disposing of such issue. He thus certainly, in very plain terms, states the problem he is called upon to solve. He says: 'The first question in the cause is whether the court has jurisdiction to determine whether an election of the directors of a private corporation has been legally held, and whether certain persons claiming to be and acting as directors are such;' and in deciding this question he declares emphatically: 'This court has no jurisdiction to determine the validity of this election, or the right of the directors elected to hold and exercise the office of directors; and therefore can grant no relief that is merely incident to that power, such as to restrain the directors from acting as such'."

Furthermore, no reason is given why an injunction should be granted. There is no allegation in the amended bill of complaint that the property of the corporation or of its stockholders is being wasted or in anywise injured by the acts of the individual defendants, but it is simply urged that they are exercising the rights of officers of the corporation.

In order to authorize the issuance of an injunction by a court of equity, there must be some wrong sought

to be redressed or some injury that may occur to the plaintiffs if the relief be not granted. The complaint in the present case is wholly lacking in any such allegation. See

Sherman v. Clark, 4 Nev. 138,

wherein similar relief was sought in a suit involving the right to a corporate office, and the Supreme Court of Nevada, in passing upon the point, held as follows:

> "Another rule having an important bearing upon this case is, that an injunction is only issued to prevent apprehended injury or mischief, and affords no redress for wrongs already committed. (Practice Act, Sec. 112.) 'Injunction,' says the learned author already quoted, 'is said to be wholly a preventive remedy. If the injury be already done the writ can have no operation, for it cannot be applied correctively so as to remove it. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong'.
>
> * * * * *
>
> It must also be made to appear that there is at least a reasonable probability that a real injury will occur if the injunction be not granted. This extraordinary writ should not be issued upon the bare possibility of injury, or upon any unsubstantial or unreasonable apprehension of it. The injury, too, must be real, and not merely theoretical.
>
> * * * * *
>
> . . . . And thus plaintiff alleges the defendant 'has attempted to remove his co-Trustee and the President of said company, and has published no-

tices in the public press to that effect, and has seized the books and all the property of the said company, and retains possession of them, and refuses to give them up to the said President and Trustee aforesaid, and prevents him from participating in the control or management thereof, and has ousted and ejected him from his said offices as President and Trustee, and refuses to permit him to discharge any of the duties of the said offices'.

* * * * *

. . . . But the prayer of the bill is: 'That the said defendant, his agents, servants and employes, be enjoined and restrained from interfering with the books and other property of the said Magnolia Gold and Silver Mining Company, and from exercising any of the functions of Treasurer, Trustee, Superintendent or Secretary, except to hold possession of said books and papers of said company, subject to the order of the Court'.

* * * * *

. . . . An injunction may probably be issued on the application of a stockholder to restrain the doing of some act by the officers, which, if done, would result in injury to the company; but if the act be done, an injunction can afford no remedy. If an officer is wrongfully removed from his office it cannot restore him to it; if the books are already taken, this writ cannot compel their return, nor restrain interference with them, unless such interference is likely to result in real injury to the corporation, which in this case is not shown. We conclude, therefore, that there is nothing in this first charge against the defendant warranting the issuance of the writ.''

The amended bill of complaint further prays that the defendants be directed to deliver to the receiver or to the plaintiffs, all of the books, assets and property of the defendant corporation. The law is clear that where the right to corporate property is only an incident resulting from a corporate office, such relief as prayed for in the amended bill here is not within the jurisdiction of a court of equity. See the following authorities:

Hayes v. Burns, 25 Appeal Cases, District of Columbia, 242,

affirmed by the United States Supreme Court in

201 U. S. 650, 50 L. Ed. 905.

"The pleadings clearly show that the main question, and the one without which no other question could have been decided, was the right of the rival parties to the offices to which each claimed to have been elected at the same meeting of the order, in November, 1902, at Niagara Falls. The bill attempts to thinly conceal that this is the principal question by alleging various grounds for equitable relief, and by praying for such relief; but when the case comes on for trial the complainants' counsel frankly states that the 'general object of the bill is to declare that the complainants are the general officers, the general executive board, of the Order of the Knights of Labor, and that the defendants are not such, each set of officers claiming to have been elected to those respective offices at the meeting of the general assembly of the Knights of Labor which met at Niagara Falls on the 11th of November of last year, 1902.' The proofs are directed to that question, and it is self-evident that without a finding upon that question the court was power-

less to make any other finding. The court clearly recognized this, and we find the statement made in the opinion of the court that 'the sole question at issue in the case, therefore, is whether or not the complainants are the legally constituted Order and Officers of the Knights of Labor (Incorporated).' It is manifest that if the complainants are not such officers they have no standing in court. Both sets of parties claim to be such general officers of the corporation, and both claim to have been elected at the same convention. The defendants, claiming to be such officers, were in possession of the property of the corporation, and the complainants were compelled to show and prove that they were entitled to the offices, before they could claim the possession of the property and ask that the defendants be enjoined from interference with the rights of the complainants to administer the affairs of the corporation. Approach the case from any and every standpoint, it will always be found that the question which must be first determined is the single, naked question of the title to the offices. We agree with counsel and court that the question of questions is the title to the offices, and until that is decided in favor of the complainants no relief of any nature can be granted them.''

* * * * *

Referring to only two or three of the many cases similar to the one under consideration, we find the law seemingly well settled. In Bedford Springs Co. v. McMeen, 161 Pa. St. 639, 29 Atl. Rep. 99, which was a suit in equity, where the relief sought was substantially the same as these complainants ask, we find the court affirming a judgment dismissing the bill upon the ground that the com-

plainant had mistaken its remedy. The court said: 'While it is true that the bill in this case was brought to compel the delivery of the property of the company, yet the real controversy as set forth in the bill and answer is upon the validity of the election of the defendants as directors of the company. If they were lawfully elected, the plaintiff has no case and is not entitled to the property claimed. Their title to the office of directors is, therefore, the real question at issue. All the averments of the bill tend to this one subject. Another election of other persons is asserted to have been the only lawful election, and the election of the defendants is alleged to have been unlawful. Thus the title of the one set of directors or of the other forms the matter of contention, and the right to have possession of the property in question is only incidental to the right to the office.' See also Com. v. Graham, 64 Pa. St. 339; Gilroy's Appeal, 100 Pa. St. 5. In the latter case the court said: 'It is perfectly clear that such a question' (title to office), 'cannot be tried by such a proceeding' (by bill in equity)."

The bill further asks that the election of the defendants as directors be declared illegal and void, and that the election of the defendants as officers of the corporation be declared illegal and void. Clearly the only question there involved is the legality or the illegality of a corporate election, of which a court of equity has no jurisdiction. The same rule holds true as to the relief asked that plaintiffs be declared and adjudicated the directors of the corporation.

The remaining relief asked in the bill is that the purported amendment to the by-laws of the defendant cor-

poration, purporting to disqualify for voting purposes certain stock, be declared illegal and void. No cases are cited in appellants' opening brief which would support the right to any such relief. We know of no reason why a court of equity should take it upon itself to declare a by-law of a private corporation illegal or void, unless some relief is sought by the plaintiff, the object of which makes such a course necessary.

In other words, a court of equity would not, simply because a corporate by-law was void, so declare, unless as an incident to granting relief to some injured party. The case cited by appellant in support of the right for this relief is

Lutz v. Webster, 244 Pa. 226, 94 Atl. 834.

The relief sought in that case was the compelling of the holding of a corporate election and in order to effectuate such relief, it was necessary for the Court to declare the by-law invalid. This case is distinguished in a later Pennsylvania case of

Cella v. Davidson, 304 Pa. 389, 156 Atl. 99,

wherein the Court had before it a question involving the validity of a corporate election, and there held:

> "So far as the holding of an election for officers of the corporation is concerned, it must be conceded that the proper remedy to compel this is by mandamus. 38 C. J. 798; Com. v. Keim, 15 Phila. 1. While it is true in Lutz v. Webster, 249 Pa. 226, 94 A. 834, a bill in equity was upheld which ordered a corporate election, the circumstances in that case were exceptional and unique, and the real purpose of the proceeding was to set aside an improper by-

law, and thus bring about a meeting of the corporation.

A court of equity cannot acquire and retain jurisdiction of matters not justiciable before it, such as the removal of corporate officers or the direction of corporate election, through the medium of another matter pleaded within its cognizance, but as to which after hearing it does not act and grants no relief. Ahl's App. 129 Pa. 49, 61, 62, 18 A. 475, 477."

The two cases mainly relied upon by appellants to support their position that a court of equity has the jurisdiction here contended for by appellants are

Johnstone v. Jones, 23 N. J. Eq. 216,

and

Westside Hospital v. Steele, 124 Ill. App. 534.

In the case first above mentioned, the question was the right of the plaintiffs *who were in possession of certain railroad property* to enjoin other persons from interfering with the contractors constructing its road. The defendants set up that they were directors of the corporation. The Court stated that the question of the title to the office was not the main question involved, and held as follows:

"If the question of the legality of an election or whether a certain person holds such an office arises incidentally in the course of a suit of which equity has jurisdiction, that court will inquire into it and decide as any other question of law or fact that arises in the case. . . . but the decision is

only for the purpose of the suit. *It does not settle the right to the office or vacate it if the party is in actual possession.*"

(Italics not in original).

The case of the Westside Hospital v. Steele, also relied upon by appellants, involved a stockholders bill wherein it was charged that two sets of directors were contending over the property of the corporation; that the property of the corporation was deteriorating; the patients of the hospital were not paying their bills; the banks had refused to acknowledge the right of either set of directors to check on the corporation's funds and the corporation's business was about to be ruined because of the conditions existing between the two rival boards of directors. The stockholders had a beneficial interest in seeing the property of the corporation protected and the court of equity for that reason, as appears in the decision, interfered in the case and exercised jurisdiction. Furthermore, this case is decided by a subordinate court in Illinois and is frequently quoted as representing a minority view of equity's jurisdiction in cases of this character. Furthermore, the distinguishing feature not present in the instant case is that this was an action by stockholders for the benefit of the corporation. Here the action is by the plaintiffs as purported directors and not in their capacity as stockholders, and is not even alleged to be for the benefit of the corporation, but is directly brought against the defendant corporation. This distinguishing characteristic should demonstrate that this case, so urgently relied

upon by the appellants, is not analagous to the present situation. See the case of

Sherman v. Clark, 4 Nev. 138 at 149,

wherein the Court held as follows:

> "The affirmance of the order of the lower Court meets my approval on this distinct ground—that the plaintiff shows no right in himself to maintain the action. Suit was brought by Sherman as plaintiff in his individual name, whereas he shows by the complaint that the seventy-nine and a half shares of Magnolia Company stock were held by him exclusively in the character of a trustee for the Austin Silver Mining Company—a foreign corporation. It is not even shown by the pleading that the plaintiff is a stockholder, or has an interest in either of the corporations; nor are there any special circumstances appearing to authorize him to wage a contest with defendant concerning any of the alleged grievances. To all intents and purposes the plaintiff by his own showing, is so far an *outsider* that he could not properly bring the action in his individual name."

In the instant case, Mina H. Johnson, as far as the record in this case shows, owns no stock in her individual name, but was the executrix of the estate of I. H. Johnson, deceased, and I. H. Johnson did own certain stock in the defendant corporation. Her sole right then, which she seeks to protect by this action, is her right as an individual to act as a director of a corporation.

It appears, therefore, that the main question involved in this case is who are or who are not the directors of

the defendant corporation. All other questions raised by the amended bill of complaint are simply incident to this question, and that alone must be determined to grant any ultimate relief to the plaintiffs. The courts are uniform that equity has no such jurisdiction, as is pointed out by the foregoing decisions.

Does the Supplemental Bill of Complaint State a Cause of Action for Equitable Relief

The supplemental bill of complaint sets out in substance that the defendants, as officers and directors of the defendant corporation, sold the stock of all persons who had not paid their assessments for the amount of such assessments and costs. It appears that the stock of the plaintiffs here was sold to one P. N. Petersen. Petersen was made a party to the supplemental complaint but it does not appear in the record that any service has ever been made upon him, or that he has ever appeared in the action. The relief prayed for by the supplemental bill of complaint is that the cloud on the title to the stock sold at delinquent sale be removed, and that it be declared that the purchasers obtain no right, title or interest in and to the stock purchased.

It seems extraordinary that a court of equity should be asked to declare stock held by Mr. Petersen invalid without Mr. Petersen being before the court. As to the remainder of the stockholders other than the plaintiffs in this action, plaintiffs can have no possible right to intervene on their behalf to have a cloud on the title to their stock removed. That right belongs solely to

the injured parties, not to these plaintiffs. See

Sherman v. Clark, 4 Nev. 138, at 146,

wherein the Court held:

> "The cancelation of stock belonging to Brown, and the transfer of it by the defendant to himself, are acts for which Brown has his legal remedy if he chooses to pursue it, but it gives the plaintiff no cause of action. If Brown himself does not wish to complain, the plaintiff, who is simply a stockholder in the company, has no right to complain for him. Brown himself could not obtain an injunction upon such a showing. He might recover his stock, or damages for its conversion, in a proper proceeding, but he could neither obtain the return of his stock nor its value in damages through the medium of an injunction. To enjoin the defendant from interfering with the books of the company would not restore Brown's stock, nor does it appear that there is any more stock that the defendant can cancel; an injunction, therefore, would seem to be useless."

Further, the settled rule is that if the original or amended bill of complaint did not state a cause of action, one cannot be brought in by events occurring after the filing thereof and made a part thereof by a supplementary pleading. See, to this effect:

Kryptok v. Haussman & Co., 216 Fed. 267,

holding:

> "If a plaintiff be without cause of action at the time of the filing of his bill, he is not helped in the sense of having his action continued by bringing in subsequent matters which constitute a good

cause of action, but which are sought to be brought in after answer filed."

Mellor v. Smither, 114 Fed 116,

holding that a plaintiff who has no cause of action at the time of the filing of his original bill cannot by amendment or supplemental bill, introduce one which accrues thereafter. See also, to the same effect:

N. Y. Security & Trust Co. v. Lincoln Street Railway Co., 74 Fed. 67;

Putney v. Whitmire, 66 Fed. 385.

In the case at bar, even if the facts stated in the supplementary pleading constitute a cause of action, the ruling of the lower court was correct for the reason that the amended bill of complaint showed no cause of action in the appellants, and under the rules last stated, appellants could not be aided by the filing of the supplemental bill.

Was the By-Law Complained of Invalid.

It is contended on behalf of appellants that the by-law restricting the voting of stock on which the assessment had not been paid was in violation of the laws of the State of Nevada. The Corporation Law of Nevada, section 28, being section 1627, Nevada Compiled Laws, 1929, provides, in part, as follows:

"Unless otherwise provided in the certificate or articles of incorporation or an amendment thereof, every stockholder of record of a corporation shall be entitled at each meeting of stockholders thereof to one vote for each share of stock standing in his

name on the books of the corporation."

It will be observed that such statute gives the right for a change in this voting power. The articles of incorporation of the defendant corporation provide as follows:

> "At all elections of directors of this corporation, each holder of *stock possessing voting power,* shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected and he may cast all of such votes for a single director, or may distribute them among the number to be voted for or any two or more of them as he may see fit."
>
> (Italics not in original).

By the section above quoted, it is the contention of appellees that the incorporators of the defendant corporation restricted, at least in some degree, the voting power of the stock by the use of the words "stock possessing voting power". Unless some such restriction was contemplated, the words "possessing voting power" would be surplusage in the articles. If appellees' view of this section of the articles of incorporation is correct. then the only question involved is whether the by-law here passed by the directors was a reasonable one. See the following authorities:

14 *C. J.,* 366;

Thompson on Corporations, Volume 2, Section 1161;

Detwiler v. Commonwealth, 18 Atl. 990,

stating the rule as follows:

"A corporation is a voluntary association of

> persons engaged in a common enterprise. When the methods of voting are not fixed by general law, the corporators may make the law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the state or of the United States. The general law did not touch either of the questions now raised, and for that reason the corporators or stockholders took them up, and made a law for themselves, covering both subjects. They have provided that stockholders shall have one vote for each share held by them up to ten shares, and they have fixed the proportion which his votes shall bear to his shares above that number. This is a reasonable regulation, it is uniform in its operation, it conflicts with no law, and it is binding on all the shareholders.''

In the present case the by-law operates uniformly on all shareholders, it conflicts with no law and is binding on all shareholders. It is certainly a reasonable one in that it has for its object the compelling of equal payments by all the shareholders of assessments on stock. To allow one set of shareholders to withhold payments on their stock assessments while the remaining stockholders paid for the benefit of the corporation their assessments, would, to say the least, present an unjust and unequitable situation. The assessment should be paid by all shareholders alike, and those who do not pay should not have a voice in electing the representatives to spend the money paid by the remaining shareholders.

In the motion to dismiss filed herein on the part of the appellees, one of its grounds was that the bill show-

ed on its face that it was without equity. The position here assumed by the appellants in this case is surely not one that could appeal to the conscience of a chancellor. After a large percentage of the stockholders had paid their assessments, appellants claiming to act as directors met and continued the delinquent sale date so as to defeat the sale of their own stock for non-payment of assessment. (Tr. page 54). When a large percentage of the stockholders had contributed their money to keep such corporation operating, it would be most inequitable to allow the control of such moneys and of such corporation by the parties who adopted such a practice as that followed here by the appellants, so as to defeat the right of the corporation to collect assessments from all stockholders equally. This was the very situation at which the by-law here enacted by the directors of the corporation was aimed, and was to prevent unequal assessments on the entire body of stockholders. It would seem unjust for a court of equity, even though such a by-law were invalid, to exercise its jurisdiction to aid in the accomplishment of the purpose contemplated by the appellants.

For the foregoing reasons, the order of the United

States District Court for the District of Nevada in the above entitled matter should be affirmed.

Respectfully submitted.

THATCHER & WOODBURN,

GEO. B. THATCHER,

WM. WOODBURN,

WM. J. FORMAN,

Attorneys for Appellees,

F. E. HORTON, FRANK HORTON, JR., R. McCARTHY, A. F. PRICE, and WEEPAH HORTON GOLD MINES COMPANY, a corporation.

No. 6946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MINA H. JOHNSON, SIGMUND BEEL, and A. G. BRODIE,

Appellants,

vs.

F. E. HORTON, FRANK HORTON, JR., R. MCCARTHY, A. F. PRICE, WEEPAH HORTON GOLD MINES COMPANY, a corporation organized and existing under the laws of the State of Nevada, IVEN T. JEFFRIES, O. U. PRYCE, and P. N. PETERSEN,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

MAURICE E. GIBSON,
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Appellees.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now the appellants, Mina H. Johnson, Sigmund Beel, and A. G. Brodie, in the above-entitled and numbered case and respectfully petition and pray that this Honorable Court will rehear and reconsider its judgment or decree made and entered on the 20th day of March, 1933, affirming the judgment or order of the District Court of the United States, in and

for the District of Nevada, dismissing the amended bill of complaint and the supplemental bill of complaint on file herein, and that this Honorable Court will reverse the judgment of the Honorable District Court on the following grounds, to-wit:

The amended bill of complaint and supplemental bill of complaint, it is respectfully submitted, state a cause of action in equity and your denial of the right of appellants to proceed to enforce their rights through this equitable proceeding leaves them helpless, with no adequate remedy at law.

It is submitted there is no action or series of actions that appellants can initiate or prosecute at law which will afford them the relief to which they are entitled, and that every consideration of public policy dictates that the rights of appellants herein should be adjudicated in one suit in equity with the Chancellor having jurisdiction of the entire subject matter of the litigation.

With all due respect to your Honors' opinions herein, it is submitted that your reliance on the general rule that, the title to a corporate office is not usually tried in a Court of Equity, to decide this case is not justified by the facts pleaded or the inferences reasonably to be drawn therefrom; for the reason that the instant case goes beyond the intendments of that general rule and presents a situation in which effect should be given to the many exceptions to the rule rather than the rule itself.

For the foregoing reasons it is respectfully urged that the judgment heretofore rendered by this Court

affirming the order of dismissal of the lower Court be set aside and a rehearing granted.

Dated, San Francisco,
April 19, 1933.

MAURICE E. GIBSON,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
April 19, 1933.

MAURICE E. GIBSON,
Counsel for Appellants and Petitioners.

No. 6951

United States
Circuit Court of Appeals
For the Ninth Circuit

ALMA I. WAGNER, Executrix of the Estate of Robert G. Wagner, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Upon Petition to Review an Order of the United States Board of Tax Appeals

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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C. GWINN, Esq.,
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United States Board of Tax Appeals.

Docket No. 32,981

ALMA I. WAGNER, Executrix,
ROBERT G. WAGNER, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES.

1927

Dec. 15—Petition received and filed. Taxpayer notified. (Fee paid.)

Dec. 16—Copy of petition served on General Counsel.

1928

Feb. 14—Answer filed by General Counsel.

Mar. 2—Copy of answer served on taxpayer—Circuit Calendar.

1930

Jan. 16—Notice of appearance of John B. Milliken as counsel for taxpayer filed.

1930

Mar. 18—Hearing set May 16, 1930,—Los Angeles, California.

May 16—Hearing had before Stephen J. McMahon on merits. Submitted. Briefs due Sept. 1, 1930.

July 21—Transcript of hearing of May 16, 1930, filed.

Aug. 7—Brief filed by General Counsel.

Sept. 2—Brief filed by taxpayer.

1931

June 26—Findings of fact and opinion rendered—Stephen J. McMahon, Division 16. Judgment will be entered for the respondent.

June 29—Decision entered—Chas. P. Smith, Division 5.

Dec. 15—Supersedeas bond in the amount of $26,760.88 approved and filed.

Dec. 16—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Dec. 16—Proof of service filed.

1932

Feb. 12—Motion for extension to 4/16/32 to prepare and transmit record filed by taxpayer.

Feb. 12—Statement of evidence lodged.

Feb. 12—Notice of lodgment of statement of evidence, proof of service of praecipe with hearing set 2/24/32 filed. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

Feb. 12—Praecipe filed.

Feb. 15—Objections to statement of evidence filed by General Counsel.

Feb. 15—Order enlarging time to April 16, 1932, for preparation of evidence and delivery of record entered.

Feb. 24—Hearing had before Mr. McMahon on approval of statement of evidence—C. A. V.

Mar. 2—Transcript of hearing of Feb. 24, 1932, filed.

Apr. 8—Motion for extension to 6/16/32 to prepare and transmit record filed by taxpayer.

Apr. 9—Order enlarging time to June 16, 1932, for preparation of evidence and delivery of record entered.

Apr. 12—Order that petitioner amend statement of evidence and overruling certain objections of respondent entered.

June 13—Motion for extension to Aug. 16, 1932, to prepare and transmit record filed by taxpayer.

June 13—Order enlarging time to Aug. 16, 1932 for preparation of evidence and delivery of record entered.

July 18—Statement of evidence lodged.

July 27—Statement of evidence approved and ordered filed. [2]

United States Board of Tax Appeals.

ALMA I. WAGNER, Executrix,
ROGERT G. WAGNER, Deceased,
830 South Olive Street,
Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 32,981

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:E:AjJWT-5329-60-D, dated October 19, 1927, and as a basis of his proceedings alleges as follows:

I. The petitioner is an individual with office at 830 South Olive Street, Los Angeles, California.

II. The notice of deficiency, a copy of which is attached and marked Exhibit "A," was mailed to the petitioner on October 19, 1927.

III. The taxes in controversy are income taxes for the calendar year 1920 for $13,380.44.

IV. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) That in determining the profit realized from the sale of petitioner's interest in a certain patented inven- [3] tion sold to the Wagner-Woodruff Corporation in the year 1920, the Commissioner erred in not allowing any amount whatsoever as representing the March 1, 1913, value of such invention.

V. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(1) During the year 1912 petitioner and Ernest J. Schweitzer invented an indirect lighting fixture which was a decided improvement upon all other indirect lighting fixtures and embodied a concave or convex reflecting surface instead of a flat reflecting surface, as was used on all other indirect lighting fixtures. This fixture was not an entirely new device but was an improvement upon a fixture which had previously been placed upon the market. This lighting fixture was manufactured and placed upon the market for actual use in December, 1912, thus constituting a complete reduction to actual practice of said invention and demonstrating by its use its commercial feasibility. The invention was put into actual commercial quantity production in January, 1913, and orders for the actual commercial sale of such fixtures were received as early as December, 1912. After commencing the manufacture and commercial sale of the lighting fixtures, numerous orders were received and the fixtures manufactured and installed during January, 1913, and the business of manufacturing, selling and installing the same, continued to the present day.

The lighting fixtures embodying and containing this invention are manufactured under the trademark and tradename of "Briterlite."

At the time this invention was conceived and the [4] first lighting fixture embodying such invention was made, which was in December, 1912, there was a market demand existing for this character of lighting fixture. Sometime prior to this date the Luminous Unit Company of St. Louis, Missouri, had been exploiting a semi-indirect lighting fixture of this same character, and the demand for that class of fixture was sufficiently great at that time as to have become substantially the most popular electric fixture on the market. Petitioner conceived and completed this invention, which was in effect an improvement on the old type of indirect lighting fixture, to supply that demand so existent at this time. The fixture was placed on the market particularly in Los Angeles, California, and in the southern part of California.

The demand for an indirect lighting fixture came into existence with the advent of the Tungsten light, which was many years prior to the conception of this invention. This demand for indirect lighting was further increased by the perfection of the Nitrogen lamp, a lamp which was too bright to use without an indirect fixture, and which came out during the early part of the year 1912. Petitioner, in December, 1912, and especially at the basic date —March 1, 1913, had in his possession a very valuable asset in the nature of a protected invention for

a successful indirect lighting fixture, which fixture had been tried and tested on the market, especially in southern California, and had proven itself a very valuable fixture. [5]

Application for patent upon the "Briterlite" invention was not immediately made, for the reason that under the United States Patent Laws after an inventor has completed his invention he may manufacture and sell devices embodying and containing the same for any period of time not greater than two years, and still reserve his absolute right to a patent. Application for a patent on this invention was filed in December, 1914, thus taking full advantage of the rights under the Patent Laws and extending the monopoly of said invention practically three years. The patent on this "Briterlite" invention was granted September 21, 1915.

This invention was sold to the Wagner-Woodruff Company during the year 1920 for $85,000.00, petitioner's interest in said invention being one-half, or $42,500.00. The March 1, 1913, value being in excess of the amount received from the sale in 1920, no profit was realized by petitioner on this transaction.

VI. The petitioner prays for relief from the deficiency asserted by the respondent on the following and each of the following particulars:

(a) That he should be allowed a value as of March 1, 1913, on the protected invention sold to the Wagner-Woodruff Company, and that the value

of this invention as of this date was in excess of the selling price in 1920.

WHEREFORE, petitioner prays that this Board may hear and re-determine the deficiency herein alleged.

ALMA I. WAGNER,
Executrix. [6]

State of California,
County of Los Angeles.—ss.

Alma I. Wagner, Executrix, Robert G. Wagner, Deceased, hereby duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

ALMA I. WAGNER.

Subscribed and sworn to before me this 10th day of December, 1927.

[Seal] MARGUERITE LE SAGE,
Notary Public in and for the County of Los Angeles, State of California.

CLAUDE I. PARKER, Attorney,
Per FRANK G. BUTTS. [7]

EXHIBIT "A."

Form NP-2

Treasury Department,
Washington.

Office of
Commissioner of Internal Revenue.
IT:E:Aj
JWT-5329-60D
Mrs. Alma I. Wagner, Executrix,
Mr. Robert G. Wagner, Deceased,
830 South Olive Street,
Los Angeles, California.

Madam:

An examination of your income tax returns and records has been made for the years 1920 and 1921, resulting in additional taxes as set forth in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assess-

ment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:Aj-JWT-5329-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. B. ALLEN,
Deputy Commissioner.

Inclosures:
Statement
Form A.

Form 7861—Revised Mar. 1926. [8]

Statement.

IT:E:Aj
JWT-5329-60D

In re: Robert G. Wagner,
830 South Olive Street,
Los Angeles, California.

Calendar Year 1920

Net income returned			$26,915.17
Add: Profit on sale of patents		$42,500.00	
Disallowance of taxes,			
Amount returned	$1,559.83		
Amount corrected	129.74	1,430.09	43,930.09
Deduct: Rents reduced			$70,845.26
Amount returned	$1,200.00		
Amount corrected	696.34		503.66
Net income, revised			$70,341.60

Computation of Tax

Net income	$70,341.60	
Less: Exemption	2,200.00	
Balance subject to normal tax	$68,141.60	
Normal tax, 4% on $4,000.00		$ 160.00
Normal tax, 8% on $64,141.60		5,131.33
Surtax on $70,341.60		11,326.14
Amount of tax assessable		$16,617.47
Less: Previous assessment Account #305900		3,237.03
Additional tax		$13,380.44

Calendar Year 1921

Net income, returned		$19,674.45
Add: Rents received:		
Amount returned (loss)	$ 3,217.79	
Amount corrected	332.52	
	$3,550.31	
Profit on sale of stock	340.00	3,890.31
		$23,564.76

[9]

Robert G. Wagner.			Statement.
Brought forward			$23,564.76
Interest disallowed		$1,200.00	
Taxes disallowed:			
Amount returned	$1,233.97		
Amount corrected	264.37	969.60	2,169.60
Net income, corrected			$25,734.37
Computation of Tax			
Net income			$25,734.37
Less:			
Exemption		$ 2,400.00	
Dividends		400.00	2,800.00
Balance subject to normal tax			$22,934.36
Normal tax, 4% on $4,000.00			160.00
Normal tax, 8% on $18,934.36			1,514.75
Surtax on $25,734.37			1,280.78
			$ 2,955.53
Less:			
Previous Assessment Account #305157			1,873.92
Additional Tax			$ 1,081.61

Summary

Years	Additional Tax
1920—Waiver	$13,380.44
1921—Waiver	1,081.61
	$14,462.05

The General Counsel for the Bureau of Internal Revenue, after careful consideration of the evidence submitted, holds that the taxpayer's income should be computed upon the basis that there was received $25,000.00 for a half interest in the basic patent and $17,000.00 for a half interest in the design patents.

Inasmuch as the taxpayer is now deceased, the penalty proposed in Bureau letter dated October 30, 1926, has been removed.

[Endorsed]: Filed Dec. 15, 1927. [10]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations of paragraph I of the petition.

II. Admits the allegations of paragraph II of the petition.

III. Admits that the taxes in controversy are deficiency income taxes for the calendar year 1920 amounting to $13,380.44.

IV. Denies that respondent erred in any of the respects as alleged in paragraph IV of the petition.

V. Denies the allegations of paragraph V of the petition.

Denies generally and specifically each and every allegation not hereinbefore admitted, qualified, or denied.

WHEREFORE, it is prayed that the appeal be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

LEROY L. HIGHT,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

[Endorsed]: Filed Feb. 14, 1928. [11]

[Title of Court and Cause.]

A true copy: Teste.

B. D. GAMBLE, Clerk.

Docket No. 32,981 Promulgated June 26, 1931.

Upon the evidence *held* that petitioner has not overcome the presumption of the correctness of the respondent's determination that an invention, patent for which had not been applied for on March 1, 1913, had no fair market price or value at that date.

George H. Koster, Esq., and John B. Milliken, Esq., for the petitioner.

R. W. Wilson, Esq., for the respondent.

FINDINGS OF FACT AND OPINION.

This is a proceeding for the redetermination of a deficiency in income tax for the year 1920 in the amount of $13,380.44. The only error alleged is that in determining the profit realized from the sale of Wagner's interest in a certain patented invention to the Wagner-Woodruff Corporation in 1920 the respondent refused to allow any amount whatsoever as representing the March 1, 1913, value of such invention, which date was previous to the filing of an application for a patent and the granting thereof.

FINDINGS OF FACT.

The petition is filed in the name of Alma I. Wagner, as executrix of the Estate of Robert G.

Wagner, deceased. Robert G. Wagner is hereinafter referred to as the decedent.

The decedent was an individual with office at 830 South Olive Street, Los Angeles, California. [12]

In 1911, the decedent and one Ernest J. Schweitzer were the owners of the stock of the Wagner-Woodruff Corporation, a corporation engaged in the business of manufacturing and selling electric lighting fixtures in Los Angeles. About that time, due to the fact that a new type of gas light was brought out which was very bright, several kinds of indirect electric lighting fixtures appeared on the market. Among these were the Brascolite, manufactured by the St. Louis Brass Works, and the Phoenix Light. Most of the commercial houses, General Electric, Edison Co., and others were putting in these indirect lighting fixtures. In 1912 and 1913, the Brascolite was the most popular one of these types of fixtures and was in great demand. At that time the Brascolite had been installed in a great many commercial buildings in Seattle, Denver, Salt Lake City, Chicago, Minneapolis, Detroit, and the important Eastern cities. This fixture is still in great demand.

This Brascolite fixture was an indirect lighting unit having a translucent globe inverted and a reflecting pan above it.

In 1912, Schweitzer and the decedent, working in the factory of the Wagner-Woodruff Corporation, invented an indirect electric lighting fixture which

they called the Briterlite. This was a lamp mounted in a globe of translucent material and having above it a downwardly reflecting reflector of curved contour so as to diffuse the light downward. These lights were being manufactured and sold to a very limited extent in 1912 and 1913. In January or February, 1913, [13] the decedent and Schweitzer had obtained a contract for the production and installation of a number of "Briterlite."

Schweitzer and the decedent in the latter part of 1912 consulted Frederick S. Lyon, an attorney at law, who, at that time, had been engaged for about 20 years in practicing exclusively in patent, trade mark and copyright matters, and who had represented decedent in a number of patent matters. Lyon caused an examination of the records of the patent office to be made and rendered to Schweitzer and the decedent an opinion or report as to the patentability of the Briterlite invention. He advised Schweitzer and the decedent that the Briterlite did not infringe the original Guth patent which was the patent covering the Brascolite. The Guth patent had been originally in litigation and the original claims were held to a certain limitation. Subsequently, an application was made by the owner of the Guth patent for a reissue or amended patent on the Guth invention and a reissue was granted. The result was that while the Guth patent was sustained generally the rights of the decedent and Schweitzer could not be cut off because they

were intervening rights, the decedent and Schweitzer having invested their money, made their application for patent, and gone into actual manufacture of the Briterlite. Decedent and Schweitzer were thus able to continue in the manufacture and sale of the Briterlite without regard to the fact that the reissue of the Guth patent shut out others who were not licensed. The only fixture in competition with the Brascolite and which did not infringe the Guth patent was the Briterlite, because of the intervening rights of the decedent and Schweitzer. [14]

One of the material differences between the Briterlite and the Brascolite was that the upper reflecting surface of the Brascolite or Guth patent was flat. The original Guth patent was limited to a flat upper reflecting surface and to the patent arrangement of the other reflecting surfaces with relation to it. The Briterlite differed essentially in that it had a curved pan at the top. It was not within the scope of the original Guth patent although the reissued Gath patent did not limit the Guth invention in that same manner. The Briterlite also had three hooks on the bowl and the bowl could be more easily removed than the bowl on the Brascolite. The Briterlite was an improvement over other fixtures of the same type and could be sold readily in competition with them.

An application for patent covering the Briterlite fixture was filed sometime during the year 1914 and

a patent was thereafter granted about September 21, 1915.

The Briterlite was made in about eight different sizes and styles. In 1913, the best seller sold for from $18 to $20. In computing the sales list price for the Briterlite the cost of labor and material was taken as a basic cost and 50 per cent of this amount added for overhead. The retail selling price was double that amount.

In 1920 the demand for these indirect lighting fixtures was not as great because a new type of glass had been invented which was thin in texture so as to allow maximum rays of light to pass entirely through the glass. This was very cheap to market. [15]

In 1920 the decedent and Schweitzer sold the patent on the Briterlite fixture to the Wagner-Woodruff Corporation for $85,000. They each owned a one-half interest in this patent. The respondent determined that the decedent derived an income from this transaction in the amount of $42,500.

OPINION.

McMAHON: The question here presented is whether the respondent erred in computing the gain in 1920 upon the sale, for $85,000 of the Briterlite patented invention. Respondent contends that the invention on March 1, 1913, which was prior to the date application for patent upon such invention was filed, and before a patent was issued, had no value.

It is the contention of the petitioner that the invention had a fair market value on that date of at least $100,000 and that the deficiency should be redetermined. There is no evidence as to the cost of the invention, and therefore, the basis to be used in the determination of gain upon the sale of the asset in question is its fair market price or value at March 1, 1913. Section 202 (a) (1) of the Revenue Act of 1918. See also Goodrich v. Edwards, 255 U. S. 527. The petitioner does not contend that a loss was sustained upon the sale.

Petitioner contends that an invention, prior to the time the patent is issued thereon and even prior to the date that an application for a patent is filed, is property capable of being valued, citing, among other cases, Hershey Manufacturing Co., 14 B. T. A. 867; Hendrie v. Sayles, 98 U. S. 546; and Butler v. Ball, 28 Fed. 754. [16] However, in the view we take of the evidence in this proceeding, we do not deem it necessary to determine whether or not this contention of petitioner is correct.

Even if we assume, for the purpose of argument only, that the Briterlite invention on March 1, 1913, was valuable property, the evidence does not establish its fair market price or value at that time. At March 1, 1913, the decedent and Schweitzer did not have exclusive right to manufacture and sell the Briterlite since no patent had been granted thereon. See Gayler v. Wilder, 10 How. 476. Furthermore, from a consideration of all the evidence, we do not

believe that the issuance of a patent upon the Briterlite was assured at March 1, 1913. At that time decedent and Schweitzer had not even filed an application for patent. At that time, there was a patented invention, the Brascolite, which was quite similar to the Briterlite. The Brascolite patent had been in litigation and its limitations had not been clearly defined. There is no evidence whatsoever in the record as to the fair market price or value of the Briterlite invention or the rights of the decedent and Schweitzer therein at March 1, 1913. It follows that the determination of the respondent must be approved.

Judgment will be entered for the respondent. [17]

United States Board of Tax Appeals,
Washington.

Docket No. 32,981.

ALMA I. WAGNER, EXECUTRIX, ESTATE OF ROBERT G. WAGNER, DECEASED,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated June 26, 1931, it is

ORDERED and DECIDED: That there is a deficiency of $13,380.44 for the year 1920.

A true copy: Teste.

B. D. GAMBLE, Clerk.

[Seal] CHARLES P. SMITH,
Member.

Entered Jun 29, 1931. [18]

[Title of Court and Cause.]

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Alma I. Wagner, executrix of the estate of Robert G. Wagner, deceased, by her attorneys, Claude I. Parker and George H. Koster, and respectfully shows:

I.

The petitioner on review (hereinafter referred to as petitioner) is the duly qualified and now acting executrix of the estate of Robert G. Wagner, deceased, and now resides in Los Angeles, California, as did the decedent during the year 1920. The respondent on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue

of the laws of the United States. The individual income and profits tax return of the decedent for the year 1920, being the taxable year involved herein, was filed with the United States Collector of Internal Revenue for the Sixth District of California, the office of said Collector being [19] located within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner determined a deficiency in income tax for the year 1920 in the amount of $13,380.44, and on October 19, 1927, in accordance with the provisions of Section 274 of the Revenue Act of 1926, sent to the petitioner by registered mail notice of said deficiency. Thereafter the taxpayer filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. On June 26, 1931, the Board of Tax Appeals promulgated its findings of fact and opinion in said appeal, and on June 29, 1931, the Board entered its final order of redetermination in said appeal, wherein and whereby the Board ordered and decided that there was a deficiency of $13,380.44 for the year 1920.

III.

The deficiency for the year 1920, in controversy before the Board of Tax Appeals, arose and resulted from the determination of the Commissioner that the invention which the petitioner sold in the year

1920 had no fair market value on March 1, 1913. The Board of Tax Appeals held that the determination of the Commissioner was correct.

IV.

The petitioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of petitioner, and petitioner assigns the following errors, and each of them, which, she avers, occurred in said record, proceedings, decision and final [20] order of redetermination and upon which she relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

1. The Board of Tax Appeals erred in holding that the invention of petitioner had no fair market price or value on March 1, 1913.

2. The Board of Tax Appeals erred in holding and finding that no competent evidence was introduced to prove that the invention had a fair market price or value on March 1, 1913, there being evidence to the contrary in the record and from the testimony of the witnesses.

3. The Board of Tax Appeals erred in not redetermining the deficiency in favor of the petitioner for the year 1920 and against the Commissioner for the year 1920.

V.

WHEREFORE, the petitioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

CLAUDE I. PARKER,
GEORGE H. KOSTER,
Attorneys for Petitioner on Review,
808 Bank of America Bldg.,
Los Angeles, California.

JOHN B. MILLIKEN,
L. A. LUCE,
Of Counsel. [21]

[Title of Court and Cause.]

VERIFICATION OF PETITION FOR REVIEW.

State of California,
County of Los Angeles.—ss.

George H. Koster, being duly sworn, says that he is one of the attorneys for the petitioner on review and as such is duly authorized to verify the petition

for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision in the above entitled case; that he has read the said petition and is familiar with the statements therein contained and that the facts therein stated are true except such facts as may be stated upon information and belief and those facts he believes to be true.

GEORGE H. KOSTER.

Subscribed and sworn to before me this 15th day of October, 1931.

[Seal] MARGUERITE L. SAGE,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Dec. 16, 1931. [22]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW.

To:
C. M. Charest, General Counsel,
Bureau of Internal Revenue,
Washington, D. C.,
Attorney for Respondent on Review.

Please take notice that Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, petitioner on review in the above entitled proceeding, did on the 16th day of December, 1931, file with the United States Board of Tax Appeals a

petition for review of the decision of said Board in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which said petition for review is herewith served upon you.

CLAUDE I. PARKER,
GEORGE H. KOSTER,
808 Bank of America Bldg.,
Los, Angeles, California,
Attorneys for Petitioner on Review.

JOHN B. MILLIKEN,
L. A. LUCE,
Of Counsel.

Service of the foregoing notice and service of a copy of the petition for review mentioned in said notice is acknowledged this 16th day of December, 1931.

C. M. CHAREST,
Attorney for Respondent on Review.

[Endorsed]: Filed Dec. 16, 1931. [23]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The above entitled cause came on for hearing before the Honorable Stephen J. McMahon, Member of the United States Board of Tax Appeals, on May 16, 1930, at Los Angeles, California. George H. Koster, Esq., and Claude I. Parker, Esq., appeared for the petitioner on review, and R. W. Wilson, Esq., for C. M. Charest, General Counsel, Bureau of Internal Revenue, appeared for the respondent on review.

Prior to the testimony, the following opening statements were made by counsel for the respective parties:

Mr. KOSTER.—"In this case the petition was filed by the executrix of the estate of Robert G. Wagner, against deficiency proposed by the Commissioner of Internal Revenue on the income tax return filed by Robert G. Wagner for the year 1920 in the amount of $13,380.44.

The sole issue involved is the question of the March 1, 1913, fair market value of an invention which was later sold by the taxpayer and his partner,—by Robert G. Wagner and his partner in the year 1920 to a corporation for an amount of $85,000.

In computing the deficiency for the year 1920, the Commissioner of Internal Revenue allowed no value or cost against the sales price, thus taxing the entire sales price as a profit realized by Mr. [24] Wagner from the transaction.

We will endeavor to show by the proof that the invention had a fair market value on March 1, 1913, of at least $100,000.

Mr. WILSON.—The deficiency proposed by the Commissioner for the calendar year 1920, as disclosed in said deficiency letter is, as counsel has stated, the sum of $13,380.44. The petition is silent as to the proposed deficiency of $1,081.61 for the calendar year 1921, and the Respondent understands at this time that Petitioner waives, or is not disputing the latter sum; is that correct?

Mr. KOSTER.—That is correct, if the Court please.

The MEMBER.—So we have involved just the deficiency for 1920?

Mr. KOSTER.—That is correct.

The MEMBER.—In the amount of $13,384.44.

Mr. KOSTER.—Yes.

The MEMBER.—You may proceed with the proof, Mr. Koster."

FREDERICK S. LYON,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

My name is Frederick S. Lyon. I reside at Los Angeles, and for the past 38 years have been engaged exclusively in the practice of law as same

(Testimony of Frederick S. Lyon.)

may relate to patent, trade-mark and copyright matters. I became acquainted with Robert G. Wagner prior to 1912 and represented him in a number of patent matters. During either the latter part of November or in December, 1912, Robert G. Wagner and one Mr. Schweitzer brought to my office a light —an electric light, which they called "Briterlite," with a request for my advice as to securing a patent therefor. The light was an electric lamp mounted in a globe of translucent material, and above it was a downwardly reflecting reflector of curved contour so as to [25] diffuse the light downward. Wagner and Schweitzer had manufactured the first light either in the latter part of November or early part of December, 1912, and production was started by them in a shop in Los Angeles soon afterwards. Subsequently they made an application for patent and a patent was issued on that lamp. When Wagner and Schweitzer first came to me, I caused an examination to be made of the records of the United States Patent Office and rendered them an opinion as to its patentability. I did not immediately file an application for a patent for the reason that the law allows an invention to be in use anywhere less than two years without barring the right to a patent.

Q. Was there any patent outstanding of any similar lighting system as the "Briterlite"?

A. The only question which was involved, preliminary, in that, was a patent owned, if I remem-

(Testimony of Frederick S. Lyon.)
ber the name of the St. Louis concern correctly, Luminous Unit Company—I may be wrong on some of these names, but I think it was the Guth patent, —that patent had been originally in litigation and the original claims were held to a certain limitation. I advised Mr. Wagner and Mr. Schweitzer that the Briterlite,—that was their invention and I will call it that for short hereafter, did not infringe that original patent. Subsequently an application was made by the Luminous Unit Company for a reissue or amended patent on that Guth invention, and a reissue was granted. The result of that was that while they were able to sustain the Guth patent generally, the rights of Mr. Wagner and Mr. Schweitzer could not, of course, be cut off, because they were intervening rights; having invested their money, they made their application for patent and had gone into actual manufacture, but before the application was reissued, so that Mr. Wagner and Mr. Schweitzer were able to continue in the manufacture and sale of their Briterlite without regard to the fact that the reissue patent shut out other people that were not licensed.

At the date of March 1, 1913, the so-called Brascolite,—I think I have got the name right, that was manufactured under the Guth patent by the Luminous Unit Company, was the most popular light or reflector, and in very great demand. I, personally, saw a great many installations of it here and elsewhere, and the only [26] non-infringing competitive

(Testimony of Frederick S. Lyon.)

light or fixture, if you want to be accurate, existed at that time because of these intervening rights of Wagner and Schweitzer, was the Briterlite we have been speaking of, that was produced in 1912 by Wagner and Schweitzer.

Thereupon the presiding Member propounded the following questions with the following answers:

(By the MEMBER.)

Q. Why do you say "non-competitive"?

A. I say "non-infringing."

Q. Non-infringing?

A. Non-infringing, because the Briterlite of Wagner and Schweitzer——

Q. I understand; it had intervening rights?

A. It had intervening rights.

Q. I understood you to say non-competitive.

A. No, I meant non-infringing.

Mr. KOSTER.—That is all, Mr. Lyon.

The MEMBER.—Cross-examine.

Cross-examination.

I was only familiar with the sales, amount of business done by the so-called Luminous Unit Company of St. Louis, to the extent that I saw numerous installations of theirs in San Francisco, Los Angeles and other cities of the United States during the years 1912, 1913 and 1914. I am positive there was competitive bidding for jobs with respect to the installation of their device. The Brascolite was in use in buildings in Los Angeles and San Francisco

(Testimony of Frederick S. Lyon.)

prior to March 1, 1913. I have never been in the employ of the Luminous Unit Company, St. Louis, nor have I in any way been interested financially in its affairs. At the present time and for many years [27] past the Brascolite has been in general use in office buildings throughout the United States. I observed many new installations of lighting fixtures that were of the Brascolite type in 1912, 1913, 1914 and 1915, and most of the new buildings that I observed during the aforesaid time were installing that type of lighting fixture. It is my recollection that the patent application for Brascolite was filed in the early part of 1914.

Q. In what details and particulars did this Brascolite to which you have been testifying, differ from the so-called Briterlite?

A. One of the particular differences which was material,—and I am speaking entirely from recollection,—one of them, if my recollection is correct, that was the Brascolite or Guth patent, showed a flat pan at the top,—that is the upper reflecting surface, and the original patent was limited to that being flat, and to the particular arrangement of the other reflecting surfaces with relation to it. Now, the Wagner and Schweitzer differed essentially in that it had a curved pan at the top, and was not within the scope of the original patent, although the reissued claims did not limit the Guth invention in that same manner.

(Testimony of Frederick S. Lyon.)

Q. When you refer to the Wagner and Schweitzer light, you are referring to Briterlite?

A. Briterlite; Briterlite is the trade name that they adopted for that, and when I say "they"—I mean Wagner and Schweitzer.

It was in November or December of 1912 that Wagner and Schweitzer, or one of them, came to my office with respect to securing a patent for them, and at or about the same time I went to their shops to look over the lights that they were building.

Q. Well, would you say that they had started the manufacture or production of these Briterlites as early as January of 1913?

A. What do you mean by "production"?

Q. You testified on direct examination that—— [28]

A. My recollection,—I am speaking from recollection only, and it is this,—that to my knowledge a contract was made for the production and installation by Wagner and Schweitzer of a number,—and I have forgotten how many it was—a fair-sized installation—as early as February, and my recollection is it was in the latter part of January, 1913.

Q. You were in their shop early in 1913, were you not?

A. Why, I was in their shop in 1913, yes.

Q. Well, I am not interested in any time after the first of March, the first two months,—January and February of 1913,—do you recall being in their shop at that time?

(Testimony of Frederick S. Lyon.)

A. I have no means of allocating the date from memory of March 1st, 1913, one side or the other.

Q. You do not have any personal knowledge, do you, as to the extent,—the actual extent—of this production as early as, or up to we will say March 1, 1913?

A. Do you mean by "knowledge" by investigation for the purposes of the opinion that I gave, as at that part of the critical time, I collected those facts; now, there was only one commercial installation except this first light that was made in 1912, that was made by Wagner and Woodruff, or Wagner and Schweitzer,—Woodruff came into the deal later—prior to the Summer of 1913, that is my recollection of that; I think that is the fact you want to get.

Q. You say one commercial installation?

A. Yes.

Q. Prior to the summer of 1913?

A. Yes.

ERNEST J. SCHWEITZER,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

I reside in Los Angeles and have been engaged in the manufacture of lighting fixtures for the past eighteen years. I was engaged in such business

(Testimony of Ernest J. Schweitzer.)

during 1912 and 1913. During 1912 and 1913 I was also engaged in the manufacture of a lighting fixture called Briterlite. The Briterlite is a pan with three hooks on the bowl, [29] with a key hole in it to release the bowl by lifting up; that is one patent —then it is a convex—we have one convex and one concave reflector.

There was then introduced as Petitioner's Exhibit No. 1 a print of the lighting fixture called Briterlite, identified by the witness and which was received in evidence without objection.

I became interested in the development of the Briterlite in 1912 after Wagner and myself had observed how successful the Brascolite had become. The glare of a new gas light on the market was a very bad feature in our opinion and to reduce same we desired to get out our patent with respect to the convex and concave reflector, also with side hooks on the Briterlite, which was different from the Brascolite. Wagner and myself manufactured for sale the Briterlite during 1912 and 1913 and did so for subsequent years. We manufactured about eight different sizes during 1912 and 1913. The best seller we had during 1912 and 1913 sold for $18.00 to $20.00. I think we arrived at the sales price by taking cost and overhead and doubling the resulting figure. Wagner and myself each owned a one-half interest in the Briterlite and we sold our interest to the Wagner-Woodruff Company, of which com-

(Testimony of Ernest J. Schweitzer.)

pany we each owned one-half of the stock, I believe in 1922 for the sum of $85,000 in property.

There was a big demand for the indirect lighting systems in 1912 and 1913 because the nitrogen lamp just came out and made it so bright against the Tungsten lamps that it gave a big opening for the indirect lighting unit.

Q. What, in your opinion, was the fair market value as of March 1, 1913, of your Briterlite invention?

Mr. WILSON.—Your Honor, just a moment, there has been no [30] proper foundation laid for the question; this witness has testified thus far that he was in a general electrical fixture business, in 1912 and 1913, and has been since that time, and he testified that this gaslight, I believe it is, came in, and as he said, it was going over big——

The WITNESS.—That was a gas lamp, the nitrogen lamp, it was a gas-filled lamp.

Mr. WILSON.—Yes, and that because of that demand, in part at least he and Mr. Wagner worked at this Briterlite. Now, there is no evidence in the record whatever relating to the existence of the invention, the extent, if any, to which it had been produced, placed on the market, or sold; the only testimony on that point is that they made eight different styles, and the best seller sold from eighteen to twenty dollars; there is no record how many were sold; as a matter of fact about the only

(Testimony of Ernest J. Schweitzer.)

thing we have thus far is that this witness was in a general electric fixture business in 1912 and 1913, and now he is asked to give his opinion,—I should say a figure, representing fair market value of a certain invention or product about which he has not been shown qualified to testify at all. There is almost an absolute dearth of any evidence, so far as this witness is concerned, relating to this particular product or the invention, so to speak, much less its value as of March 1, 1913; the Respondent submits that there has been no proper foundation laid for the question.

The MEMBER.—What have you to say to that, Mr. Koster?

Mr. KOSTER.—The witness has testified he was one of the inventors of this particular Briterlite; that he was manufacturing and selling it in 1912 and 1913; he knew of the demand existing for that type of light,—knew the reasons for the demand—I think he is qualified to testify as to what in his opinion was the fair market value of his invention at that time, based upon what he knew about conditions existing at that time.

Mr. WILSON.—If the Respondent could add this to the objection already offered, not only was there no evidence tending to show that the invention of this witness and Mr. Wagner was identical with the products that they, as the witness testified, had "gone over big"—until some evidence is produced

(Testimony of Ernest J. Schweitzer.)

showing that the two lights, or that the several lights, whatever number there may have been, were similar; further, that there was a demand for all of them,—what the demand was,—the extent of the demand,—the extent to which they were in use,—unless you have some or all of those factors, you have nothing on which to predicate a fair market value as of a specific date; in the absence of any evidence as to the extent that this product was on the market on March 1, 1913,—we have simply been [31] told that their best seller sold at a certain figure,—not the extent to which they were sold, or how many this man and his partner who were in business sold at all——

The MEMBER.—Are you asking now for his opinion as to the value of the patents?

Mr. KOSTER.—The value of the invention at that time; Mr. Lyons testified that he had an invention at that time that it was not patented until later; that during this period he had an exclusive right and he had protection.

The MEMBER.—You are asking the value of his invention?

Mr. KOSTER.—Yes.

The MEMBER.—As of March 1, 1913?

Mr. KOSTER.—Yes.

The MEMBER.—It had not been patented at that time?

(Testimony of Ernest J. Schweitzer.)

Mr. KOSTER.—No, it had not been patented, but it had a value as if it were patented, as explained by Mr. Lyons, the previous witness on the stand.

The MEMBER.—You want the fair market value; is that what you want?

Mr. KOSTER.—Yes, sir.

The MEMBER.—Of the invention as of that date?

Mr. KOSTER.—That is right.

The MEMBER.—Do you not think you ought to establish first that there was a market value: it does not appear here thus far in the proof, as I view it, that there was a fair market value or a market value for this invention; of course there was a market value for the lights, but that is another matter.

Mr. KOSTER.—Let me ask this question:

(By Mr. KOSTER.)

Q. What, in your opinion, is the fair market value as of March 1, 1913, of your Briterlite invention, and the exclusive right to manufacture and sell that type of lighting fixture?

Mr. WILSON.—Same objection.

The MEMBER.—Do you consider it established that they had the exclusive right? [32]

Mr. KOSTER.—Yes, if the Board please.

The MEMBER.—What testimony do you rely upon to support the assumption that they had the exclusive right?

(Testimony of Ernest J. Schweitzer.)

Mr. KOSTER.—Well, we have the testimony of Mr. Lyons, the previous witness, to the effect that these men came to him with this invention; that he advised them that they had an exclusive right which was protected under the patent laws as fully as if it were patented at that time, within a period of two years prior to the filing of the application for a patent, as brought out by Mr. Lyons; application for patent was later made, and the patent granted; the witness has testified that there were only two other indirect lighting fixtures outside of this Briterlite that were in use in 1912 and 1913,—that was the Brascolite and the Phoenix light; he testified that he was familiar with the demand existing at that time for this indirect type of lighting fixture; that the reason for the demand was because of the innovation of a new type of light, which required indirect lighting systems. I believe the witness is qualified to give an opinion as to the fair market value of his invention and his rights under his invention.

The MEMBER.—At this time you are offering this witness as an expert, are you?

Mr. KOSTER.—Yes.

The MEMBER.—Upon the subject of the fair market value of this invention as of March 1st, 1913?

Mr. KOSTER.—Yes, I am asking both as an expert and as an owner.

(Testimony of Ernest J. Schweitzer.)

At this point in the testimony the following colloquy occurred:

The MEMBER.—Do you wish to examine him at this time as to his qualifications as an expert, Mr. Wilson?

Mr. WILSON.—I should like to do so, yes.

The MEMBER.—You may do so.

The following records the examination of the witness by Mr. Wilson:

I have been engaged in the lighting business for the past eighteen years and Robert G. Wagner and myself were partners in the lighting business beginning with the year 1911. We also owned a [33] corporation known as the Wagner-Woodruff Company which was also engaged in the same business at or about the same time. Our immediate manufacturing business was carried on in Los Angeles, but I had occasion to observe the styles and types of lighting fixtures in other cities of the United States, particularly in the states of California and New York.

Q. Now, in 1912 and up as late as March 1, 1913, to what extent, if you know, had this new indirect lighting system come into use?

A. Why, most all of the commercial people that put in that light, General Electric, Edison Company, and all of those, on account of the new Mazda lamp,—gas filled lamp,—they had to have something to protect their eyes.

(Testimony of Ernest J. Schweitzer.)

Q. Well, where do you mean they had put it in?

A. Commercial lighting—offices.

I was informed by salesmen that a concern in St. Louis were having considerable success during 1912 and 1913 with a light known as Brascolite. I was not interested financially or otherwise in the company that manufactured the Brascolite. I could not say what the patent of the Brascolite was worth at March 1, 1913.

Mr. WILSON.—That is all.

The MEMBER.—Have you finished qualifying this witness on the subject of value?

Mr. KOSTER.—Yes, your Honor.

The MEMBER.—Will you now restate your question that you want him to answer?

Q. What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention, and the exclusive right to manufacture and sell that lighting fixture known as Briterlite?

The MEMBER.—Just a moment; you may restate your objection to this question, Mr. Wilson.

Mr. WILSON.—The objection by the Respondent to the question is predicated first upon the insufficiency of evidence thus far adduced from this witness to establish any [34] first-hand knowledge on his part as to those facts which enter into any opinion or expert testimony as to the extent to which the invention in question was in production or had been put in production or was on the mar-

(Testimony of Ernest J. Schweitzer.)

ket. Secondly the absence of any evidence which shows that this witness had any knowledge of the value,—that is the fair market value as of March 1, 1913, of the so-called Briterlite patents, upon which invention this witness' testimony has thus far been predicated. In other words the testimony thus far has been a comparison of the success and extent of marketing the so-called Briterlite lighting fixture and the so-called Briterlite fixture which was the invention of the petitioner and the witness.

The Respondent submits that the testimony has shown the witness to be a man engaged in the general lighting fixture business over a period of only about one year prior to the basic date, and to be possessed only of a very general knowledge regarding the nature of the so-called Brascolite fixtures, or the extent to which it was on the market, and summarizing, the record is barren of sufficient proof or evidence to show, first, that the Briterlite fixture was even on the market, or if so, to what extent, and of any other and all other features which necessarily go to make up and constitute qualification to testify as an expert.

The MEMBER.—What have you to say, Mr. Koster?

Mr. KOSTER.—If the Board please, this witness has testified that he knew all of the factors that entered into the question of the value of this particular invention; he knew the demand for types

(Testimony of Ernest J. Schweitzer.)
of fixtures similar to the Briterlite; he knew what the Briterlite cost him to make; he knew what it would sell for; he knew the profit he could be expected to make on it; he knew the demand, as I say; he invented the product; his testimony is that he has been in the lighting fixture business for the last eighteen years; I believe he is qualified to testify as to the March 1, 1913, value of that invention, and the rights under that invention; as to comparisons with the Brascolite, we compared it to show reasons for expectation of demand, and also the fact that the competition was very limited. This witness can not be expected to know what the sale, or what the profit being realized by the Brascolite people was, or what their valuation of any patent rights they might have would be; he is valuing just his own fixture,—the Briterlite.

Mr. WILSON.—If the respondent be permitted to use an illustration which may perhaps clarify the position taken by the respondent, if, for the sake of argument we leave the subject of lighting fixtures and use automobiles, as an illustration. Now, it is equally true that the automobile was being developed in these earlier years, back in 1911, 1912 and prior thereto, the same as lighting fixtures were [35] being modernized each year. Now, assuming that a witness testifies on direct examination that he was personally aware of the fact in 1911 and 1912 and perhaps for years prior thereto, that the

(Testimony of Ernest J. Schweitzer.)

automobile was making great headway all over the country,—it was a matter of general common knowledge and undisputed, several different kinds of makes of automobiles, all a little different, of course, but the general increasing in sales each year, the general public taking them up more as time passes. Now, he answers this question, being asked with regard to other makes of automobiles than the one he has worked on and invented,—he is asked if he is in a position to give a figure which would be representative of the fair market value of one of these other makes of automobiles as of March 1, 1913, and he says no; then by what possible reasoning could it be concluded that such a witness would be reliable to testify as to what the fair market value of March 1, 1913, would be of his automobile, if he is unfamiliar with the very machines which he has used as a comparison to arrive at an opinion that there was any value; if his knowledge is not such as to be able to give any kind of a figure representing the value of the comparisons, then how can he possibly do so as to his own, your Honor, particularly where the invention of the petitioner was newer, and thus far has not been shown to be on the market at all, except as Mr. Lyon testified, near the conclusion of his testimony, that he thought there had been one commercial installation prior to the summer of 1913, and the only other testimony has to do with what one certain unit brought, without

(Testimony of Ernest J. Schweitzer.)
any supplemental testimony as to the extent to which those units were sold.

The MEMBER.—Have you any authorities in support of your contention, Mr. Koster, that this proof is admissible?

Mr. KOSTER.—I do not have them here, if the Board please, but I would be glad to submit a brief on the question later on.

The MEMBER.—I will take this answer subject to the objection, and I will rule on the admissibility of the proof finally as the case is disposed of,—I will reserve an exception in favor of the party against whom that ruling may go, and I want to say now that I am impressed,—I want to say that, in fairness to counsel for the taxpayer, I am impressed that this is not admissible—that this witness has not been qualified as an expert on this subject, and I would like to have this question of the admissibility of this proof, or any proof of this character set out properly in any briefs that you may submit. I would like to have the authorities cited. Objection sustained. Exception granted and noted. S. J. M.

Mr. KOSTER.—I presume there is no objection to the answer being made as to the value placed upon the product by the [36] owner; in other words, this question I am asking this witness as to value he placed upon an invention and the right which he, himself owned, could be answered by him as an owner.

(Testimony of Ernest J. Schweitzer.)

The MEMBER.—I think there is a very serious question about that, where it does not appear that he is conversant with the values; it does not appear that he knows if there is a market or was a market as of that date for this article,—I mean now, of the invention,—I am not talking now of the manufactured product—I think there is a serious question about the admissibility of his opinion on that question,—I mean on the subject of the value of the invention as of that date.

Mr. KOSTER.—And the rights under the invention.

The MEMBER.—Yes; the mere fact that a man has made an invention, and owns an invention, it does not follow from that he is in position to give an opinion—an expert opinion as to the value of those inventions—that is something for the Board to pass upon, and it is a question whether or not an opinion of a man who has not been shown to know something about the market value as of a certain date,—it is a question whether his opinion would be of any value to the Board.

Mr. WILSON.—Yes, your Honor.

Mr. KOSTER.—It is a question of the weight of his opinion.

The MEMBER.—No, it is a question now whether his opinion is admissible at all. I want to hear you in the brief fully on that subject.

Mr. KOSTER.—All right.

(Testimony of Ernest J. Schweitzer.)

The MEMBER.—He may answer the question.

Mr. KOSTER.—Can you find the question, Mr. Reporter?

(The pending question was thereupon read by the Reporter, as follows):

Q. What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention and the exclusive right to manufacture and sell that lighting fixture known as "Briterlite"?

The MEMBER.—If you know, or rather, if you can answer that question. Do you understand the question?

The WITNESS.—Yes, sir.

The MEMBER.—Can you answer it?

The WITNESS.—I put my value on it at that time; is that what you want, Judge? [37]

The MEMBER.—No, that is not the question; just read the question again.

(The pending question was thereupon again read by the Reporter.)

The MEMBER.—Now, you see, that asked about what the market value was of the property described in the question. Now, the first question I am going to ask you this, is whether or not you know what the market value of this invention was, —these rights set forth in the question,—we are not talking about what you think it was worth,—the question is what the market value was, now, do you know?

(Testimony of Ernest J. Schweitzer.)

The WITNESS.—Well, I could not answer that that way, Judge, because we put a price on the Briterlite at one hundred thousand dollars.

The MEMBER.—Then, that is just your own value?

The WITNESS.—Mr. Wagner and I.

The MEMBER.—Now, that is your own value; that is not the question, then, of what the market value was, is it?

The WITNESS.—Well, we never put it on the market for sale.

The MEMBER.—So you do not know what the market value of those patents was, is that true—those inventions?

The WITNESS.—It might have been the same as the Brascolite; the Brascolite made three million dollars and perhaps more.

The MEMBER.—Just answer my question. You say this value of one hundred thousand dollars is the value that you and your associate Mr. Wagner fixed?

The WITNESS.—Yes, sir.

The MEMBER.—That is what you thought it was worth?

The WITNESS.—Yes, sir.

The MEMBER.—But you did not know,—you did not take into consideration in fixing that value as to what the market value of the invention and the rights were, is that right?

(Testimony of Ernest J. Schweitzer.)

The WITNESS.—We did not have it up for sale, no.

The MEMBER.—So this figure of one hundred thousand dollars is your own estimate and that of Mr. Wagner?

The WITNESS.—Yes, sir. [38]

The MEMBER.—Of what this invention and these rights were worth, as of March 1, 1913, is that right?

The WITNESS.—Yes, sir.

Mr. KOSTER.—That concludes the direct examination, your Honor.

The MEMBER.—I will let the answer stand subject to the objection, and with the understanding I will pass upon the question whether or not it should be received, and I will rule upon it when I dispose of the case; what I said about the brief on the subject applies to this answer as well as any other answer that was given on that subject. Objection sustained. Exception granted and noted. S. J. M.

Mr. KOSTER.—That is all.

The MEMBER.—Cross-examine.

Cross-examination.

The experimental work on the Briterlite invention was performed at 830 South Olive Street, Los Angeles, which was the place at which the factory of the Wagner-Woodruff Company was located.

(Testimony of Ernest J. Schweitzer.)

Mr. Wagner and myself sold this invention in the year 1920 to the Wagner-Woodruff Corporation for the sum of $85,000.00 in property. We sold to the Wagner-Woodruff Corporation both the basic patents and all design patents, and I do not remember the segregation of the purchase price as to each type of patent. I do not know without observing the records the extent to which we had manufactured the Briterlite up to March 1, 1913.

GEORGE J. McKENZIE,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

I reside in Los Angeles and am manager of the Wagner-Woodruff Company and have been connected with that company for the past eighteen or nineteen years. The company is engaged in the manu- [39] facture of lighting fixtures. I was with the company in the years 1912 and 1913 and the company began the manufacture of the Briterlite fixture in the year 1912. The Briterlite fixture is a semi-indirect type of lighting fixture—that is, a glass bowl below, an opaque upper reflector; a curved reflecting surface, and the upper reflector was what might be called a concave reflector.

(Testimony of George J. McKenzie.)

Q. Were there any other types of fixtures of this nature in existence at that time?

A. There was one other type that resembled that that was known as the Briterlite,—I mean known as the Brascolite—it was similar inasmuch as it had an upper reflector with a translucent bowl, but the opaque top reflector had a perfectly flat reflecting surface as against the concave by the Briterlite, and the upper reflector of the Briterlite was stepped down in such manner as to eliminate any shadow upon the ceiling where the fixture was used as a ceiling type; the bowl on the Briterlite was suspended from the outside of the reflector, against the Brascolite being suspended probably about two inches from the edge of the reflector, the feature of the Briterlite over the Brascolite pertaining to that method of suspension of the bowl, was that it allowed the bowl to be removed more readily for cleaning of the bowl and renewing the lamp.

Q. Do you know whether there was a demand for this type of fixture in the commercial world?

A. I beg your pardon.

Q. Do you know whether there was a demand for this type of fixture?

A. Yes, there was a tremendous demand for this type of fixture.

Q. Do you have any reason for that demand?

(Testimony of George J. McKenzie.)

A. Yes, the reason is very definite; at about that time the National Lamp Works, who practically controlled the distribution of electric lamps, changed their type of lamp to what is known as the nitrogen or gas-filled bulb, and it was such a pure white glaring light that it was absolutely essential that it be covered in some way; it was blinding to look at the actual bulb of the lamp, and everybody that was manufacturing lighting fixtures was attempting in some way to develop something that would eliminate that glare and make the fixture livable. Up to that time all fixtures with possibly one or two exceptions were what you would call direct light [40] fixtures,—direct reflector, with possibly multiple reflectors,—anywhere from three to ten to a fixture, with the lamp exposed, because the carbon or Tungsten lamps were in use—they had more of a reddish yellow cast to them and were not objectionable to look at. The other type of fixture which was on the market and had been marketed successfully was known as the Finish (Phoenix) Light; it had a similar principle except it was all glass, the upper reflector as well as the lower were glass. Those were the only two fixtures that were developed and marketed, to my knowledge, to any great extent.

The retail selling price of the Briterlite during the years 1912 and 1913 was based on the cost of the labor and material as a basic cost of the fixtures

(Testimony of George J. McKenzie.)

and fifty per cent of such basic cost was added to determine the overhead, and the retail price was determined by doubling both amounts. The public and trade demand for the indirect lighting fixtures, such as the Briterlite and Brascolite, was very great during the years 1912 and 1913 and was much greater in those years than during the year 1920 when new patents were developed which made the cost of installation of the new type much cheaper and had a much greater utility value than did the Briterlite or the Brascolite. The Briterlite invention and patent was acquired by Wagner and Woodruff during the year 1920. I sold fixtures during the year 1911, and for seven years prior to that I was in charge of the silverware department and lamp department of D. C. Percival and Company, wholesale jewelers. I am familiar with the demands for indirect lighting fixtures in 1912 and 1913, and I am familiar with the rate of profit resulting from the manufacture and sale of the Briterlite fixtures during the years 1912 and 1913.

Q. What would you say would be the comparison of values of the Briterlite invention and the exclusive rights to manufacture and sell thereunder as between 1920 and 1913?

Mr. WILSON.—That is objected to, your Honor; it is wholly immaterial; we are not concerned with any 1920 value,— [41] it is wholly immaterial whatever value this invention increased or decreased

(Testimony of George J. McKenzie.)

after 1913, we are not concerned, nor does the disposition of this case in any wise hinge upon 1920 value,—it was sold in 1920 for an estimated figure of eighty-five thousand dollars, that is not in dispute what it was sold for in 1920.

Mr. KOSTER.—If that fixture had a value of eighty-five thousand in the year 1920 and this witness can testify as to conditions existing between those times and at those times and can compare the values as he sees them in 1920 and 1913, I should think that that would be admissible, at least for a comparison with values existing between those two dates, or at those two dates.

Mr. WILSON.—Well, in answer to that statement, your Honor, I would suggest this: This witness has been asked right from the start of his examination concerning the first types of lighting fixtures, and then he explained in some detail how the demand for indirect lighting fixtures grew and explained briefly the difference between the Brascolite and the Briterlite, and testified that he was familiar with the demand for indirect lighting in 1912 and 1913; now, every word of that testimony goes to lighting fixtures we are concerned here with a certain property right, namely an invention; we are not concerned here with value of fixtures as merchandise; we are concerned here with fair market value of a property right, namely value of an invention as of March 1, 1913; I submit the

(Testimony of George J. McKenzie.)

witness has not been qualified to testify at all either as to a figure representing the fair market value at March 1, 1913, or a comparative figure,—you can not compare a value or fixture with the value of an invention; they are altogether different rights and property.

The MEMBER.—Read the last question, Mr. Reporter.

(The pending question was thereupon read by the Reporter.)

The MEMBER.—He may answer.

Mr. WILSON.—May I have an exception?

The MEMBER.—Exception noted.

Mr. KOSTER.—Will you read that question a little louder, Mr. Reporter?

(The pending question was thereupon read by the Reporter.)

The WITNESS.—I do not quite understand that question; who is putting this question?

Mr. KOSTER.—This is the question that was asked you before you were interrupted in your answer. [42]

The MEMBER.—You may re-state the question to the witness; he says he does not understand it.

(By Mr. KOSTER.)

Q. Will you state whether or not the value of the Briterlite invention and the exclusive rights to manufacture and sell thereunder were greater or less in 1920 than in 1913 and 1912?

(Testimony of George J. McKenzie.)

A. They were less in 1920 than in 1912; is that the question?

The MEMBER.—Now, do you object to this question and answer?

Mr. WILSON.—Yes, sir, on the grounds heretofore stated, your Honor.

The MEMBER.—You move to strike it out?

Mr. WILSON.—Yes, I move to strike it out.

The MEMBER.—The answer will be allowed to stand, subject to the objection and the motion, and the question of admissibility will be disposed of at the time of the decision in the case, and the exception will be reserved for the party against whom the ruling may go. The objection is sustained. The motion is granted. Exceptions are granted and noted. S. J. M.

Mr. KOSTER.—That is all.

The MEMBER.—Cross-examine.

Mr. WILSON.—No cross-examination.

The MEMBER.—You are excused.

MAX L. GORDON,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

My name is Max L. Gordon and I reside in Los Angeles. I have been engaged in the lighting fixture business and was one of the owners of the

(Testimony of Max L. Gordon.)

California Fixture Company from 1909 to 1912. I then sold out and was the owner of the National Fixture Company from 1912 to 1925. Prior to 1909 I was also engaged in the lighting fixture business and have been in that business practically all my life. I am familiar with the type of lighting fixtures in use during the years 1912 and 1913. I sold the Brascolite fixture quite [43] extensively in my business, and in my business I was also engaged in the manufacturing of lighting fixtures and am familiar with the cost of manufacturing lighting fixtures. I am familiar with the demand for lighting fixtures, particularly in California, and also the company with which I was connected had three traveling salesmen that canvassed the lighting fixture trade all over the country.

Q. Do you know what the general method was for arriving at list price—sales price for fixtures,—and has that method prevailed in the fixture business during the years 1912 and 1913?

A. Yes, sir.

Q. What was that method?

A. Take the cost of material plus the labor, add fifty per cent for general overhead, shop expense, and so on, and double that cost, and you have the retail selling price.

Q. What, in your opinion, was the fair market value as of March 1, 1913, of the Briterlite invention and the exclusive right to manufacture and sell under that particular invention?

(Testimony of Max L. Gordon.)

Mr. WILSON.—Just a moment; that question is the first mention, your Honor, that counsel or witness have made of any invention at all; they have been talking here about the general sale and the market of light fixtures and the general method of arriving at sales prices, and now, without any further preliminaries, the witness is asked to state an opinion as to the fair market value of a certain invention, which, so far as the record thus far shows, he knows nothing whatever about.

Mr. KOSTER.—If the Board please, the witness testified that he knew the Briterlite,—knew the light,—knew what it was sold for,—he knows what the general profit to be realized from the sales of fixtures are or were at that time; he knew the demand; he was engaged in the business of manufacturing and selling fixtures; he is competent to determine the price for a light such as the Briterlite, and the price at which it could be purchased and still realize a profit to the purchaser.

Mr. WILSON.—May the respondent be permitted to ask the witness a question with regard to qualifications? [44]

The MEMBER.—Yes.

(By Mr. WILSON.)

Q. Mr. Gordon, you and your company handled and sold several different types of fixtures, did you not?

A. We sold our own make and makes of others, that is, not as much as our own makes.

(Testimony of Max L. Gordon.)

Q. Now, you were more interested, of course, in the sale of your own products?

A. Of our own products, yes.

Q. Now, do you recall, Mr. Gordon, the fact that you did handle the Briterlite fixture as early as 1913?

A. We never sold the Briterlite fixture.

Q. You never sold it?

A. We never sold it, but I knew the Briterlite fixtures as well as I knew our own.

Q. You knew that they were being manufactured and sold?

A. Yes.

Q. You knew the kind of light it was?

A. We would have liked to have sold them, if we could have possibly made arrangements with Mr. Wagner.

Q. You were unable to sell it because it was patented?

A. And he was a hard man to deal with.

Q. Well, were you ever connected at any time with Mr. Wagner or Mr. Schweitzer or the corporation, the Wagner-Woodruff Corporation?

A. I knew them all.

Q. I say, were you interested in them?

A. No, never.

Q. You had no connection with the office or plant?

A. No.

(Testimony of Max L. Gordon.)

Q. You do not profess to know anything of your own knowledge at all regarding the extent of their manufacturing activities in 1912 and 1913, did you? [45]

A. In reference to that fixture?

Q. The extent of the manufacture, yes.

A. Well, I knew they were a pretty live concern that were doing a lot of manufacturing.

Q. You knew they were doing a lot of business?

A. I sure did; they were a large competitor of ours.

Mr. WILSON.—I think that is all.

The MEMBER.—Read the question, Mr. Reporter.

(The pending question was thereupon read by the Reporter, as follows:)

"Q. What, in your opinion, was the fair market value as of March 1, 1913, of the Briterlite invention and the exclusive right to manufacture and sell under that particular invention?"

The MEMBER.—What is your objection; what are the grounds for the objection?

Mr. WILSON.—The witness is now asked to answer a question regarding the fair market value of a certain property right, namely an invention. This witness has testified, as your Honor has heard, the length of time he has been in business, the nature of that business; he has testified he was familiar with this Briterlite fixture; he has not said anything about the invention as a property right;

(Testimony of Max L. Gordon.)

he has been talking about the Briterlite fixture, in answer to my questions a moment ago he stated that his firm had never sold the Briterlite, because they could not; that he was familiar with the fixtures and knew that it was in production and recognized it, that is, the company, as a competitor. Now, nowhere, either in that examination or in the witness' direct examination has there been a word stated about the invention property right, the fair market value of which is here now being sought to be established; the witness is wholly unqualified thus far to give any testimony in regard to the value of the invention—the property right.

The MEMBER.—Do you understand the question that is before you now?

The WITNESS.—Yes, sir.

The MEMBER.—Can you give an opinion as to this value?

A. I can.

Q. You say you can? [46]

A. I can.

The MEMBER.—You may answer, subject to the objection of counsel for the respondent. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—I will answer it in my own way.

The MEMBER.—With the understanding that an exception will be reserved to the party against whom the ruling goes, when the ruling is finally made; you may just answer the question, if you

(Testimony of Max L. Gordon.)
understand the question. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—I can answer the question in my own way?

(By Mr. KOSTER.)

Q. Yes, you may answer the question.

A. The reason I say that is we had several large jobs we were figuring——

The MEMBER.—Just a minute, we do not want any argument here, we want an answer to this question, which is a plain question, asking for your opinion as to a value. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—If I were to estimate the value of that patent, if I could have had it at that time, I would have been willing to pay about seventy-five to one hundred thousand dollars for it, because I know the demand was great.

(By Mr. KOSTER.)

Q. Upon what, I will ask you, would you base that opinion of value, Mr. Gordon?

A. We were selling, starting in from about 1913, about 3,000 National lights a year, and there was no comparison, as far as the National Light and Briterlite was concerned in appearance, because, for the reason, I would safely say, and will readily make that statement, when we would submit both samples on some particular contract, and invariably the Brascolite would win; the exception in that case was the Rosslyn Hotel, we happened to win, but in

(Testimony of Max L. Gordon.)
most cases the Brascolite, it was easier to clean——

Q. Are you referring to Brascolite?

A. I am referring to the Briterlite; it was easier to clean, to detach a bowl from the plate, and it was a better looking fixture than ours; of course, we are out of business now.

Q. What factors did you use in computing your value of seventy-five to one hundred thousand dollars? [47]

A. Well, I would have been willing to pay a dollar per unit as a royalty, if I could have got the exclusive right to it, even for California on account of so many new and old constructions going on on buildings, and so on.

Q. What was your estimate of the number of units that might be sold under the right?

A. I would safely say ten thousand a year.

Q. For what period of years?

A. Well, the economic life of a thing of that kind, I would say ten years.

Q. Then, what would you do,—I am trying to find out——

A. Well, we would still sell it, I, as a manufacturer, would take advantage of it, if I would pay the seventy-five thousand, would take advantage of the rest of the time for myself, as additional profit; if I were to sell 500, I would consider that 500 as additional profit to my concern.

Q. Now, in arriving at the value you place upon this, what other factors do you use, and how do

(Testimony of Max L. Gordon.)

you apply those factors; you have stated now the number of units you estimated would be sold, the royalty rate; just explain how you compute your value.

A. What do you mean by "value"?

Q. You stated the value was seventy-five to one hundred thousand dollars?

A. Yes, I estimate the value so many fixtures a year,—say ten thousand a year, at a dollar per fixture, is ten thousand dollars; if I could buy that patent for seventy-five thousand, why I would think it would be a good investment, and that would be, when I say seventy-five thousand, I refer to the Pacific Coast alone,—my experience,—I have not sold any fixtures back east until 1923, then I had three men on the road.

Mr. KOSTER.—That is all.

The MEMBER.—Cross-examine.

Cross-examination.

I would have paid seventy-five to one hundred thousand dollars for the exclusive right to manufacture that particular fixture for the Pacific Coast. [48]

Q. For the patent?

A. For the patent.

JEROME FUGATE,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

My name is Jerome Fugate. I reside in Los Angeles. I am at present a partner in the Wagner-Woodruff Company. I have been a partner for the past three years. Prior to that time I was associated with the Myberg Company of Los Angeles in the capacity of selling their product. I was employed by the Myberg Company about seven years. Prior to that time I was in the business of designing and manufacturing lighting fixtures for myself at Tacoma, Washington. Prior to that time I was manager of the Mullins Electric Supply Company at Tacoma, Washington. During the years 1912 and 1913 I was associated as a salesman with the W. G. Hudson Company of Los Angeles, selling lighting fixtures, and during the years 1909, 1910, 1911 and 1912 I was with the Capital Electric Company of Salt Lake City, which company was engaged in the designing, manufacturing and distribution of lighting fixtures and supplies. While associated with the Capital Electric Company I was their traveling auditor. The Capitol Electric Company was a very large concern and conducted a very extensive jobbing and manufacturing business. I am familiar with the types of lighting fixtures in existence in 1912 and 1913. The Brascolite fixture was by far the best known fixture, and

(Testimony of Jerome Fugate.)
following that came the Briterlite fixture manufactured in Los Angeles and then the Phoenix light.

Q. Do you remember how the Briterlite fixture compared with the Brascolite fixtures in 1913, as to its salability? [49]

A. It could easily be sold in competition with the Brascolite, because of the superior features which it had from a selling standpoint.

Q. Do you know what the sales of the Brascolite fixtures by the Central Capitol Electric Company was during the period you were employed by them?

Mr. WILSON.—That is objected to, your Honor, if the witness is now called upon to give figures representing the sales; the books and records of that company is the best record of what sales were made.

Mr. KOSTER.—I am asking if he knows; he can answer that yes or no.

The MEMBER.—The question is, do you know?

The WITNESS.—I could not answer in dollars and cents, sir, no sir.

(By Mr. KOSTER.)

Q. Do you know approximately the extent of sales of that type of fixture in the territory you mentioned, by the Capitol Electric Corporation, during the years you were employed by them?

Mr. WILSON.—Same objection.

The MEMBER.—What is your objection?

(Testimony of Jerome Fugate.)

Mr. WILSON.—He is asking this witness to testify, as I understand it, to the volume of sales by a certain company for a certain period of time. The objection is that the books and records of that company are the best evidence what sales were made; the books reflect their volume of business and sales. The second ground of objection is it is wholly incompetent, irrelevant and immaterial as to what that company may have sold in a given year; that has no relation to the issue here as to the March 1st, 1913, value of a certain invention, your Honor.

(By the MEMBER.)

Q. You did not sell the Briterlite at the time in question?

A. I did not.

The MEMBER.—Objection sustained.

Mr. KOSTER.—If the Board please, the factors in determining values of a property right such as this, primarily you must consider the demand that can be reasonably estimated or could be contemplated for that particular product, manufactured under that right; [50] now, we compare this product that we have with the Briterlite, primarily showing it was a superior product and showing in general the demand for the Brascolite,—since the Briterlite was not manufactured prior to 1912, and we can not show sales of the Briterlite prior to 1913, we should be able to make some use of the demands and the actual sales of similar fixtures as

(Testimony of Jerome Fugate.)

a comparison, to show there was a demand and it could be reasonably expected that the same demand could be contemplated for a fixture of superior character. I am asking the witness to state generally what the demand was during the time he was with the Capitol Electric Company in 1909 to 1912, in the territory covered by that corporation.

The MEMBER.—The ruling will stand; the objection is sustained.

Mr. KOSTER.—May I have an exception?

The MEMBER.—Exception granted.

(By Mr. KOSTER.)

Q. Assuming that you had, or that you could purchase at March 1, 1913, or thereabouts, a right, a patent or an invention, together with the exclusive right to manufacture and sell that patent or invention covering a lighting fixture, which was superior to Brascolite at that time; what would you consider, or what in your opinion would be the fair market value of a product (property) at that time, of the product (property) that was being offered to you for sale or for purchase?

Mr. WILSON.—That is objected to, your Honor, for the reasons which certainly must be obvious; in the first place the question is predicated upon the assumption that the Briterlite invention was, in fact, superior to any other product, namely Brascolite, concerning which we know absolutely nothing. In other words, the answer, even if given,—even if an answer were made here would most cer-

(Testimony of Jerome Fugate.)

tainly be subject to a motion to strike on the ground that it is wholly incompetent, irrelevant and immaterial. The second ground of the objection is that the question assumes the value of a certain property right which is patented. Now, the evidence in this case clearly shows that this invention was not patented on March 1, 1913, at all, the application was not made until in 1914 and the patent issued in 1915, so that the hypothetical question does not cover the facts thus far developed in this case.

The MEMBER.—In the first place, did you understand the question?

The WITNESS.—I think I do, sir. [51]

The MEMBER.—Do you want it read again?

The WITNESS.—I would prefer to have it read again.

The MEMBER.—Read the question.

(The pending question was thereupon read by the Reporter.)

The MEMBER.—In the first place, can you answer that question; that is something you can answer yes or no; I am asking you if you can answer that question; I would like to have you answer yes or no.

The WITNESS.—Yes, sir.

The MEMBER.—You can answer that question?

The WITNESS.—I think so.

The MEMBER.—The answer will be taken, subject to the objection. Objection sustained. Exception granted and noted. S. J. M.

(Testimony of Jerome Fugate.)

The WITNESS.—Well, I would first, of course, have to base the value of such a right to manufacture on what the supply and demand for the product in question would be. The only thing I would have to base such an estimated value upon would be, naturally, upon my knowledge of the distribution possibilities, based on past experience of a similar type fixture in the United States, in general, distribution possibilities, in other words. I would say that in my experience with the Capitol Electric Company of Salt Lake City, where we operated this chain of twenty-one stores, that I made reference to using that as a basis; the average sales of those institutions ran very close to ten thousand a month; they were not large institutions, —about half of their sales were based upon commercial fixtures,—store lighting fixtures,—office building fixtures, and so on. This Brascolite had absolutely been the only unit that could be sold in this territory, coming into Los Angeles, I found the Briterlite invention here in use and it offered a highly competitive fixture which could readily be sold in competition with the Brascolite, and it would have been little or no problem whatever for any manufacturer to have easily reached a distribution of one hundred thousand units per year in the United States. I would base that upon the averages of sales for an average store,—an average institution running around one thousand units per year; it would not be very difficult to obtain one

(Testimony of Jerome Fugate.)

hundred of such distributing points in this country; I would say a very fair market value for the privilege of manufacturing such a fixture would have been, at a minimum, one hundred thousand dollars. [52]

Cross-examination.

I was passingly acquainted with Mr. Wagner during his lifetime, and have had an intermittent acquaintance with Mr. Schweitzer since 1914. The first time I had occasion to see their plant was in the year 1927. I was not informed during the year 1913 as to the dollars and cents business which Wagner and Schweitzer did, but I was familiar in 1913 with their business from the standpoint of the installations of lighting fixtures which they carried on in the city of Los Angeles.

Q. Now, among other factors which enter into the manufacture of lighting fixtures, one factor of some importance is the matter of available capital, is it not, Mr. Fugate?

A. I think so.

Q. You do not profess to know anything about the financial status of the Wagner-Woodruff Corporation in 1913, do you?

A. No, sir.

Q. In fact the possibility of manufacturing or producing enough units, whether it be electrical fixtures or anything else, is dependent, first of all, upon financial ability, is it not?

(Testimony of Jerome Fugate.)

A. I would say not, for if the invention has sufficient merit, I think it will attract capital.

Q. All right; now, will you tell the Board just how you arrived at the valuation which you testified was one hundred thousand dollars as at March 1, 1913?

A. I think I have already answered that question, sir.

Q. Suppose you answer it again.

A. In my answer I said that I would base that upon the ready distribution of at least one thousand units per year for the average size dealer or distributor, as the case might be, and that it would be quite possible to obtain one hundred such distribution concerns in the United States over which the patents or the right to manufacture would permit these fixtures to be distributed. [53]

Q. Well, do you know whether or not the Wagner-Woodruff corporation distributed one hundred thousand units in 1913; you do not know how many they distributed?

A. I know nothing whatever about their distribution.

Q. What do you mean by "fair market value"?

A. I would say by "fair market value" the price at which an article could be sold to a concern for the promotion or manufacture of it, and price that they would be willing and ready to pay for such a right to manufacture.

(Testimony of Jerome Fugate.)

Q. When did you first become acquainted with this Briterlite fixture?

A. In 1913.

Q. About what time in the year?

A. I came to Los Angeles in the late fall of 1912,—I think it was in October, sir, and found the Briterlite fixture being used in installations in the early spring following.

Q. Now, would you say that you saw those installations as early as the first of March of that year?

A. I would say so, yes, sir.

Q. Had you seen very many of them at that time?

A. The majority of new jobs which had been installed during the first two months of the year were of units of that type, yes, sir.

Q. What installations that you know about were made in January and February of 1913?

A. I would not be in position to name them.

Q. Which type of light was used?

A. I do not know the names.

Q. Do you remember the number?

A. The number of units installed?

Q. Not the units; the number of jobs, we will say.

A. That would be rather difficult to place at this late date, seventeen years ago.

Q. Well, you seem to recall with great definiteness the fact that there were in the two first months

(Testimony of Jerome Fugate.)

of 1913,— [54] I thought you could recall some of the jobs?

A. There are certain circumstances in our history which makes it very easily possible to trace back to that date, and that was the advent of the new lamp, which absolutely revolutionized the sale of merchandise in our industry.

Q. In 1913?

A. That came in 1912, the incandescent lamp of which I spoke I think came in in the latter part of 1911.

Q. Now, keeping out of your mind, Mr. Fugate, the information and knowledge you have at the present time with regard to this development of this Briterlite and Brascolite, and putting yourself,—placing yourself back, figuratively speaking, to on or about March 1, 1913, do I understand you to testify that you would have on that date,—you would have been willing on that date to have paid one hundred thousand dollars for the Briterlite invention?

A. I did.

Q. Now, you had become acquainted with that lighting fixture during the previous few months, had you not?

A. With that particular fixture, yes, sir.

Q. As a matter of fact that fixture was not produced before December, 1912, at the earliest, was it, so far as you know?

(Testimony of Jerome Fugate.)

A. As far as I know some place in there, the fixture made its appearance on the market, yes, sir.

Q. You knew nothing at all on March 1, 1913, about the possibility of this invention being an infringement or there being a possibility of inability to secure a patent; you knew nothing about that, did you?

A. It was generally conceded at that time that the Briterlite was being manufactured under its own patent rights,—in other words that they had secured permission to manufacture this particular fixture, and that it did not infringe upon the Brascolite which was so extensively being sold.

Q. As a matter of fact they had not secured any such rights at all March 1, 1913, had they; as a matter of fact you did not know on March 1, 1913, anything about the patentability or the possibility of securing a patent or of having the application denied, did you, as a matter of fact, you could not have known it, could you? [55]

A. The trade impression, of which I was, of course, a party was that those gentlemen had secured the right to manufacture a fixture in competition with the Brascolite, and that is the right we were speaking of, as I understand, in placing the market value upon it.

Q. I see; would you not have given this one hundred thousand dollars, if they could have assured you that you would have had exclusive privilege of manufacturing it?

(Testimony of Jerome Fugate.)

A. Will you put that question again, sir?

Q. Would you have been willing to have paid this corporation one hundred thousand dollars for that invention if there had been any doubt in your mind as to whether or not there was going to be a patent issued, or you were going to have the exclusive right to manufacture and sale,—if there had been any doubt on that point, would you have paid the one hundred thousand dollars?

A. I think that point would have had to have been cleared up, sir.

Q. All right, now, let us understand each other; this statement you made that in your opinion the fair market value of that invention on March 1, 1913, was one hundred thousand dollars, that statement is predicated, is it not, Mr. Fugate, on the assumption that the invention on that date carried with it the exclusive right to manufacture,—in other words, a patent?

A. A patent, or the fact that this invention, the idea, was patentable.

Mr. WILSON.—Yes, all right; that is all.

The MEMBER.—Any further questions?

Mr. KOSTER.—That is all.

FRANK N. COOLEY,

called as a witness by and on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct Examination.

My name is Frank N. Cooley, and I reside in Los Angeles. I am at present engaged as a lighting specialist for the Graybar Electric Company, formerly the Western Electric Company, and have been in that position for the past eighteen years and four months. [56] My duties are the supervision of all lighting unit lines of lighting materials. Prior to my employment by the Graybar Electric Company I was employed in the general lighting fixture business. In 1912 and 1913 I was employed by the Western Electric Company as a lighting specialist. The Western Electric Company at that time had sixty-two houses in the United States, and today Western Electric Company have seventy-six houses, doing approximately ninety to one hundred million dollars of business during the year. I am familiar with the demands of the trade in 1912 and 1913 for an indirect lighting fixture, and during those years the demand for that type of fixture became very noticeable.

Q. What brought about the demand for that type of fixture?

A. A development of the Type-C, gas filled Mazda lamp.

Q. Just how did that bring about this demand for indirect lighting systems?

(Testimony of Frank N. Cooley.)

A. Previous to that the incandescent lamp business was confined to the carbon lamp, the filament of which was made out of carbon bamboo and gave off a rather reddish or yellow light. With the development of the gas filled lamp, the brilliancy of the filament was so much greater that it was necessary to cover the light in such way that it would not cause glare, resulting in eye-fatigue.

Q. Were you familiar with the prevailing rates at which manufacturing under patent rights were secured as they existed in 1912 and 1913?

A. I believe I am qualified in that way to a certain extent, due to the fact that I watched the development of the lighting fixture business since '99, and I worked as a mechanic for about ten years and on sales work and specialty work for the balance of twenty years.

Q. You stated that you were familiar with the demand for the indirect lighting fixtures; when did that demand first begin to show itself?

A. Immediately upon the development of the Type C lamp in 1911 or 1912. [57]

Q. Was your company selling indirect lighting fixtures at that time?

A. No, we did not sell the indirect line until probably 1913 or 1914.

Q. Assuming that you were able to purchase an invention with the exclusive rights to manufacture and sell the product covered by that invention, and that invention was of an indirect lighting fixture

(Testimony of Frank N. Cooley.)

which was superior at that time, and by "that time" I mean on or about March 1, 1913, to the other indirect lighting fixtures with which it might compete. What would you—what, in your opinion would be the fair market value of such an invention with the rights,—exclusive rights,—pertaining thereto, be as of March 1, 1913?

Mr. WILSON.—That is objected to first on the ground that the question is worded, and subject to the same criticism as has been directed to that question asked the previous witnesses; it contains first of all an assumption on the part of the witness—strike that—it contains first of all an assumption that some indirect lighting system, not described at all as the Briterlite or any other particular make, is superior, and was at that time superior, to everything else on the market, and secondly that the market value is for a thing which either is patented, or which gives exclusive rights of manufacture, which incidentally has not been shown here at all to apply to the Briterlite there, and lastly it is subject to the objection that it is so uncertain and indefinite as to be of no value whatever in the matter of arriving at a figure which might represent the fair March 1, 1913, value of the Briterlite invention. This witness has been asked, simply, "Assuming that you could purchase some patent or protected invention of an indirect lighting fixture which is superior to others,"—now there has been no testimony or evidence here tending to show at

(Testimony of Frank N. Cooley.)

any time today that this Briterlite fixture was the best on the market; as a matter of fact the record is almost barren of any testimony or evidence as to just when this article was put on the market, and in the absence of such evidence, together with the ambiguity contained in the question, the respondent urges the objection on the grounds just stated.

The MEMBER.—Objections sustained.

(By Mr. KOSTER.)

Q. Assuming that the Briterlite——

(By the MEMBER.)

Q. Just a moment; Mr. Cooley, were you familiar with this Briterlite? [58]

A. I was not at that time.

Q. Did you ever become familiar with it?

A. During the last five or six years only.

Q. In other words, you did not know the Briterlite until the last five or six years?

A. Yes.

Q. And in the last five or six years you have been familiar with it?

A. Yes.

Q. You have seen it in operation?

A. Yes, sir.

Q. And you have examined it?

A. Yes, sir.

The MEMBER.—Proceed.

(By Mr. KOSTER.)

Q. Assuming that the Briterlite invention carried with it the exclusive rights to manufacture

(Testimony of Frank N. Cooley.)
and sell the Briterlite fixture, which was a lighting fixture superior to other indirect lighting fixtures in existence on or about March 1, 1913, what in your opinion would be the fair market value as of March 1, 1913, of that Briterlite invention?

The MEMBER.—Just a moment. Have you finished your question?

Mr. KOSTER.—Yes.

Mr. WILSON.—That is subject to the same objection as heretofore made, coupled with the further objection that there has been no proper foundation laid for the question at all; the witness has not been qualified to testify to anything like that, which he is now asked to give.

Mr. KOSTER.—If the Board please, this witness has been in the lighting fixture business since '99; he has had general supervision of a lighting company which was nationally known, operating 62 stores at that time, he knew the fixture business; he knew the fixtures being developed and sold; he knew the demand for fixtures around March 1, 1913; he knew there was a demand for that indirect lighting fixture, brought about by reason of the invention and marketing of a certain new Tungsten light; he knew the prevailing rates under which rights [59] to manufacture were offered to manufacturers for patented articles; certainly if a hypothetical question can be put to him stating the facts which we believe our testimony in the case has proven, that he is qualified to give his opinion

(Testimony of Frank N. Cooley.)

as to the value of that property, based on the facts which are presented to him in the hypothetical question.

(By the MEMBER.)

Q. Do you know what lights or fixtures of the character of the Briterlite were being manufactured in 1912 and 1913?

A. Yes, I knew of the Brascolite; I knew of the Phoenix light, and I knew also of the Perfect Light, which was made in Seattle, all of the same order, having a reflecting surface back of them, and since then there has been any number of units, in the last few years, developed along those lines.

Q. Do you know of any others that were being manufactured in 1912 and 1913?

A. Those three are the only ones I know at that time.

Q. Is it possible there were some other manufacturers that you did not know about?

A. There might have been.

Q. That there were others manufactured that you did not know about?

A. Yes, there might have been.

Q. You would not want to say that those were the only kind being manufactured in 1912 and 1913?

A. No.

Mr. KOSTER.—Those assumptions which we have made in the hypothetical question, if your Honor please, we feel were supported by testimony

(Testimony of Frank N. Cooley.)
that has gone before; we submit that we should be entitled to use the facts which we believe have been proven by our testimony in the hypothetical question which we are presenting to this witness who is qualified to answer the question.

The MEMBER.—I will ask you to re-state your question now, Mr. Koster.

Mr. KOSTER.—May I have it re-read, if the Board please, by the Reporter?

(Thereupon the Reporter read the hypothetical question propounded to the witness by Mr. Koster.) [60]

The MEMBER.—Is that the question you want answered?

Mr. KOSTER.—That is the question.

The MEMBER.—Do you understand the question?

The WITNESS.—I do.

The MEMBER.—I will ask you now, can you answer that question,—I am not asking you to answer it at present; I am asking you to tell me whether you can answer it or not.

The WITNESS.—Yes.

The MEMBER.—Do you know whether or not the Briterlite was superior to the other makes of light that you state were being manufactured in 1912 and 1913, with which you were then familiar?

The WITNESS.—From information which I have had in the last five years, I believe that the Briterlite is of better design than the Brascolite

(Testimony of Frank N. Cooley.)

or other lights that I had come in contact with up to that time.

The MEMBER.—You may answer, subject to the objection of counsel for the respondent. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—I would say a fair market value of that invention is worth about $300,000.

(By Mr. KOSTER.)

Q. Will you state upon what you base your opinion of that value, Mr. Cooley?

A. I would base that on an estimate of possibly five thousand units in this territory, which would be approximately fifteen thousand units for the Coast, which, under our system of estimating the entire country is ten per cent of the entire country's demand for that class of stuff, and that would give about 150,000 units. From experience that I have had in attempting to market an invention, I find that the prevailing royalty basis is approximately five per cent of the manufacturing cost; the manufacturing cost of one of those units, I would say, the average cost, would be about ten dollars, which would be about fifty cents a unit, at fifty cents a unit, a million and a half units would figure around $750,000. In my estimation, due to the fact that you have ten years of practical life of the patent,—the other seven you might be getting started and competition may come up, but by discounting that fifty per cent it still brings it down to $375,000; that

(Testimony of Frank N. Cooley.)
is how I roughly estimate the market value of the invention. [61]
(By the MEMBER.)

Q. As of March 1, 1913?

A. Yes, because that was the time when it was very valuable; it is not now, because of all of the competition.

Mr. KOSTER.—That is all.

Cross-examination.

Giving my estimate of 150,000 units, I was referring to a distribution in 1912 or 1913. I only knew from information which has been given me as to when the Briterlite was first put on the market and could not of my own knowledge testify that it was on the market on March 1, 1913. My opinion of a $300,000.00 fair market value as of March 1, 1913, is based upon a unit that was superior to the present indirect units on the market, as I know the Briterlite today. When I use the word "unit" I mean a lighting fixture and a lighting fixture is commonly called a lighting unit. In giving my opinion as to value, I took into account the privilege of exclusive manufacture of a patented invention or one whose patent was assured.

Q. If there had been on March 1, 1913, any doubt as to the possibility of securing patent, or if at that time no application for patent had ever been filed, would that make any difference in the valuation, in your opinion?

(Testimony of Frank N. Cooley.)

A. Yes, sir, I should want to be assured of the exclusive right to manufacture.

(By the MEMBER.)

Q. Now, the value you gave is your opinion of the value as of March 1, 1913, is that right?

A. Yes, your Honor.

Q. And you assume that the article that was described to you was being manufactured on or about March 1, 1913?

A. Yes, your Honor.

Q. And did you give your opinion of the value in the [62] light of conditions that existed on March 1, 1913, in this line of business?

A. Yes, your Honor.

Mr. WILSON.—That is all.

Mr. KOSTER.—That is all.

It was stipulated by and between counsel for the parties that the application for patent covering the Briterlite fixture was filed some time during the year 1914 and that the patent was thereafter duly granted on or about September 21, 1915.

The initials "S. J. M." appearing in the above rulings upon motions and objections are those of Stephen J. McMahon, Member of the United States Board of Tax Appeals, who heard the proceedings, and wrote the report of the Board, consisting of the Findings of Fact and Opinion, Promulgated June 26, 1931.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned as attorney for the petitioner on review.

GEORGE H. KOSTER,
Attorney for Petitioner on Review. [63]

The foregoing evidence is all of the material evidence adduced at the hearing, and in order that the same may be preserved and made a part of this record, this statement of evidence is duly approved and settled this .....day of....., A. D. 1932.

.....
Member,
United States Board of Tax Appeals.

Approved and ordered filed this 27th day of July, 1932.

LOGAN MORRIS,
Member.

[Endorsed]: Filed July 27, 1932. [64]

[Title of Court and Cause.]

NOTICE OF LODGMENT OF STATEMENT AND OF FILING OF PRAECIPE.

To:

C. M. Charest, General Counsel,
Bureau of Internal Revenue,
Washington, D. C.,
Attorney for respondent on review.

Notice is hereby given you that Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, petitioner on review in the above entitled proceeding, did on the 12th day of February, 1932, file with the Clerk of the United States Board of Tax Appeals, Washington, D. C., a praecipe for record herein, a copy of which said praecipe as filed is herewith served upon you.

Notice is also hereby given you that the petitioner on review lodged with the Board of Tax Appeals on the 12th day of Feb., 1932, a proposed Statement of Evidence herein, a copy of which said Statement of Evidence as filed is herewith served upon you.

You are hereby further notified that the petitioner on review will present this statement of evidence for settlement and [66] approval by the United States Board of Tax Appeals at 9:30 o'clock A. M., Feb. 24th, 1932.

CLAUDE I. PARKER,
GEORGE H. KOSTER,
Counsel for Petitioner on Review.

JOHN B. MILLIKEN,
L. A. LUCE,
Of Counsel.

Service of the foregoing notice and of copies of the praecipe for record and statement of evidence mentioned in said notice is acknowledged this 12th day of Feb., 1932.

C. M. CHAREST,
Attorney for Respondent on Review.

[Endorsed]: Filed Feb. 12, 1932. [67]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies, duly certified as correct, of the following documents and records in the above entitled proceeding in connection with the petition for review by the said United States Circuit Court of Appeals for the Ninth Circuit heretofore filed by the petitioner on review:

1. Docket entries of proceedings before the Board, Docket No. 32,981.

2. Pleadings before the Board in Docket No. 32,981, including:

(a) Petition with exhibits attached thereto;

(b) Commissioner's answer to petition;

(c) Findings of fact and opinion promulgated by the Board June 26, 1931;

(d) Decision of the Board entered June 29, 1931;

(e) Petitioner's Exhibit No. 1.

3. Petition for Review, together with proof of notice of filing same.

4. Supersedeas Bond (not included in record). [68]

5. Statement of Evidence as finally agreed upon or approved.

6. Notice of lodgment of Statement of Evidence and filing of Praecipe and proof of service.

7. This praecipe.

CLAUDE I. PARKER,
GEORGE H. KOSTER,
Attorneys for Petitioner
on Review.

JOHN B. MILLIKEN,
L. A. LUCE,
Of Counsel.

[Endorsed]: Filed Feb. 12, 1932. [69]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 69, inclusive, contain and are a true

copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 5th day of August, 1932.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 6951. United States Circuit Court of Appeals for the Ninth Circuit. Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed August 24, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit.
No. 6951

ALMA I. WAGNER, Executrix of the Estate of Robert G. Wagner, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED ASSIGNMENTS OF ERROR.

The petitioner submits that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of petitioner, and the petitioner assigns the following errors, and each of them, which she avers occurred in said record, proceedings, decision and final order of redetermination and upon which she relies to reverse the said decision and final order of redetermination so rendered and entered by said Board of Tax Appeals, to-wit:

I.

The Board of Tax Appeals erred in holding that the Briterlite invention had no fair market price

or value on March 1, 1913, since such conclusion is not supported by the evidence.

II.

The Board of Tax Appeals erred in holding and finding that no competent evidence was introduced to prove that said invention had a fair market price or value on March 1, 1913, there being evidence to the contrary in the record and from the testimony of the witnesses.

III.

The Board of Tax Appeals erred in not redetermining the deficiency in favor of the petitioner for the year 1930 and against the Commissioner for the year 1920.

IV.

The Board of Tax Appeals erred in sustaining the objections of counsel for respondent to the admission in evidence of the testimony of the witness Ernest J. Schweitzer, co-inventor with Robert G. Wagner of the Briterlite invention, concerning the fair market value on March 1, 1913, of said Briterlite invention.

The witness had testified that he resided in Los Angeles and had been engaged in the manufacture of lighting fixtures for the past eighteen years and was engaged in such business during 1912 and 1913; that during 1912 and 1913 he was also engaged in the manufacture of a lighting fixture called Briter-

lite; that he became interested in the development of the Briterlite in 1912 after he and Wagner had observed how successful the Brascolite had become; that in their opinion the glare of a new gas light on the market was a very bad feature and to reduce same they desired to get out their patent with respect to the convex and concave reflector, also with side hooks, on the Briterlite, which was different from the Brascolite; that he and Wagner manufactured for sale the Briterlite during 1912 and 1913 and for subsequent years; that they manufactured about eight different sizes during 1912 and 1913, and the best seller during those years sold for $18.00 to $20.00; that they arrived at the sales price by taking cost and overhead and doubling the resulting figure; that he and Wagner each owned a one-half interest in the Briterlite and they sold their interest to the Wagner-Woodruff Company for the sum of $85,000.00; that there was a big demand for the indirect lighting system in 1912 and 1913 because the nitrogen lamp had just come out and made it so bright against the Tungsten lamps that it gave a big opening for the indirect lighting unit.

Further testimony of the witness, objections of counsel for respondent, and the ruling of the Board Member will more fully appear as follows:

> The MEMBER.—Will you now restate your question that you want him to answer?
>
> Mr. KOSTER.—What, in your opinion, was the fair market value on March 1, 1913, of your

Briterlite invention, and the exclusive right to manufacture and sell that lighting fixture known as Briterlite?

The MEMBER.—Just a moment; you may restate your objection to this question, Mr. Wilson.

Mr. WILSON.—The objection by the Respondent to the question is predicated first upon the insufficiency of evidence thus far adduced from this witness to establish any first-hand knowledge on his part as to those facts which enter into any opinion or expert testimony as to the extent to which the invention in question was in production or had been put in production or was on the market. Secondly the absence of any evidence which shows that this witness had any knowledge of the value,—that is the fair market value as of March 1, 1913, of the so-called Briterlite patents, upon which invention this witness' testimony has thus far been predicated. In other words the testimony thus far has been a comparison of the success and extent of marketing the so-called Briterlite lighting fixture and the so-called Briterlite fixture which was the invention of the petitioner and the witness.

The respondent submits that the testimony has shown the witness to be a man engaged in the general lighting fixture business over a period of only about one year prior to the basic date, and to be possessed only of a very general

knowledge regarding the nature of the so-called Brascolite fixtures, or the extent to which it was on the market, and summarizing, the record is barren of sufficient proof or evidence to show, first, that the Briterlite fixture was even on the market, or if so, to what extent, and of any other and all other features which necessarily go to make up and constitute qualification to testify as an expert.

The MEMBER.—What have you to say, Mr. Koster?

Mr. KOSTER.—If the Board please, this witness has testified that he knew all of the factors that entered into the question of the value of this particular invention; he knew the demand for types of fixtures similar to the Briterlite; he knew what the Briterlite cost him to make; he knew what it would sell for; he knew the profit he could be expected to make on it; he knew the demand, as I say; he invented the product; his testimony is that he has been in the lighting fixture business for the last eighteen years; I believe he is qualified to testify as to the March 1, 1913, value of that invention, and the rights under that invention; as to comparisons with the Brascolite, we compared it to show reasons for expectation of demand, and also the fact that the competition was very limited. This witness can not be expected to know what the sale, or what the profit being realized by the Brascolite people was, or

what their valuation of any patent rights they might have would be; he is valuing just his own fixture,—the Briterlite.

Mr. WILSON.—If the respondent be permitted to use an illustration which may perhaps clarify the position taken by the respondent, if, for the sake of argument we leave the subject of lighting fixtures and use automobiles, as an illustration. Now, it is equally true that the automobile was being developed in these earlier years, back in 1911, 1912 and prior thereto, the same as lighting fixtures were being modernized each year. Now, assuming that a witness testifies on direct examination that he was personally aware of the fact in 1911 and 1912 and perhaps for years prior thereto, that the automobile was making great headway all over the country,—it was a matter of general common knowledge and undisputed, several different kinds of makes of automobiles, all a little different, of course, but the general increasing in sales each year, the general public taking them up more as time passes. Now, he answers this question, being asked with regard to other makes of automobiles than the one he has worked on and invented,—he is asked if he is in a position to give a figure which would be representative of the fair market value of one of these other makes of automobiles as of March 1, 1913, and he says no; then by what possible reasoning could it be concluded that

such a witness would be reliable to testify as to what the fair market value of March 1, 1913, would be of his automobile, if he is unfamiliar with the very machines which he has used as a comparison to arrive at an opinion that there was any value; if his knowledge is not such as to be able to give any kind of a figure representing the value of the comparisons, then how can he possibly do so as to his own, your Honor, particularly where the invention of the petitioner was newer, and thus far has not been shown to be on the market at all, except as Mr. Lyon testified, near the conclusion of his testimony, that he thought there had been one commercial installation prior to the summer of 1913, and the only other testimony has to do with what one certain unit brought, without any supplemental testimony as to the extent to which those units were sold.

The MEMBER.—Have you any authorities in support of your contention, Mr. Koster, that this proof is admissible?

Mr. KOSTER.—I do not have them here, if the Board please, but I would be glad to submit a brief on the question later on.

The MEMBER.—I will take this answer subject to the objection, and I will rule on the admissibility of the proof finally as the case is disposed of,—I will reserve an exception in favor of the party against whom that ruling may go, and I want to say now that I am im-

pressed,—I want to say that, in fairness to counsel for the taxpayer, I am impressed that this is not admissible—that this witness has not been qualified as an expert on this subject, and I would like to have this question of the admissibility of this proof, or any proof of this character set out properly in any briefs that you may submit. I would like to have the authorities cited. Objection sustained. Exception granted and noted. S. J. M. (Tr. pp. 42 to 46.)

Thereafter the witness was permitted to continue his testimony as follows:

The MEMBER.—He may answer the question.

Mr. KOSTER.—Can you find the question, Mr. Reporter?

(The pending question was thereupon read by the Reporter, as follows):

Q. What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention and the exclusive right to manufacture and sell that lighting fixture known as "Briterlite"?

The MEMBER.—If you know, or rather, if you can answer that question. Do you understand the question?

The WITNESS.—Yes, sir.

The MEMBER.—Can you answer it?

The WITNESS.—I put my value on it at that time; is that what you want, Judge?

The MEMBER.—No, that is not the question; just read the question again.

(The pending question was thereupon again read by the Reporter.)

The MEMBER.—Now, you see, that asked about what the market value was of the property described in the question. Now, the first question I am going to ask you this, is whether or not you know what the market value of this invention was,—these rights set forth in the question,—we are not talking about what you think it was worth,—the question is what the market value was, now, do you know?

The WITNESS.—Well, I could not answer that that way, Judge, because we put a price on the Briterlite at one hundred thousand dollars.

The MEMBER.—Then, that is just your own value?

The WITNESS.—Mr. Wagner and I.

The MEMBER.—Now, that is your own value; that is not the question, then, of what the market value was, is it?

The WITNESS.—Well, we never put it on the market for sale.

The MEMBER.—So you do not know what the market value of those patents was, is that true—those inventions?

The WITNESS.—It might have been the same as the Brascolite; the Brascolite made three million dollars and perhaps more.

The MEMBER.—Just answer my question. You say this value of one hundred thousand dollars is the value that you and your associate Mr. Wagner fixed?

The WITNESS.—Yes, sir.

The MEMBER.—That is what you thought it was worth?

The WITNESS.—Yes, sir.

The MEMBER.—But you did not know,—you did not take into consideration in fixing that value as to what the market value of the invention and the rights were, is that right?

The WITNESS.—We did not have it up for sale, no.

The MEMBER.—So this figure of one hundred thousand dollars is your own estimate and that of Mr. Wagner?

The WITNESS.—Yes, sir.

The MEMBER.—Of what this invention and these rights were worth, as of March 1, 1913, is that right?

The WITNESS.—Yes, sir.

Mr. KOSTER.—That concludes the direct examination, your Honor.

The MEMBER.—I will let the answer stand subject to the objection, and with the understanding I will pass upon the question whether or not it should be received, and I will rule upon it when I dispose of the case; what I said about the brief on the subject applies to this answer as well as any other answer that was

given on that subject. Objection sustained. Exception granted and noted. S. J. M. (Tr. pp. 48-50.)

(When the statement of evidence was finally settled the Board Member added the following notation, as appears on page 87 of the printed transcript of record: "The initials 'S. J. M.' appearing in the above rulings upon motions and objections are those of Stephen J. McMahon, Member of the United States Board of Tax Appeals, who heard the proceedings, and wrote the report of the Board, consisting of the Findings of Fact and Opinion, Promulgated June 26, 1931.")

V.

The Board of Tax Appeals erred in rejecting as evidence the testimony of the witness Ernest J. Schweitzer, concerning his opinion, as owner of the invention, of the fair market value on March 1, 1913, of the Briterlite invention.

The witness had been asked:

> "What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention, and the exclusive right to manufacture and sell that lighting fixture known as Briterlite?"

Counsel for respondent objected and the Member sustained the objection on the ground that the witness was not qualified as an expert. The following then took place:

Mr. KOSTER.—I presume there is no objection to the answer being made as to the value placed upon the product by the owner; in other words, this question I am asking this witness as to value he placed upon an invention and the right which he, himself owned, could be answered by him as an owner.

The MEMBER.—I think there is a very serious question about that, where it does not appear that he is conversant with the values; it does not appear that he knows if there is a market or was a market as of that date for this article,—I mean now, of the invention,—I am not talking now of the manufactured product—I think there is a serious question about the admissibility of his opinion on that question,—I mean on the subject of the value of the invention as of that date.

Mr. KOSTER.—And the rights under the invention.

The MEMBER.—Yes; the mere fact that a man has made an invention, and owns an invention, it does not follow from that he is in position to give an opinion—an expert opinion as to the value of those inventions—that is something for the Board to pass upon, and it is a question whether or not an opinion of a man who has not been shown to know something about the market value as of a certain date,—it is a question whether his opinion would be of any value to the Board.

Mr. WILSON.—Yes, your Honor.

Mr. KOSTER.—It is a question of the weight of his opinion.

The MEMBER.—No, it is a question now whether his opinion is admissible at all. I want to hear you in the brief fully on that subject.

Mr. KOSTER.—All right.

The MEMBER.—He may answer the question. (Tr. pp. 46 to 48.)

The witness then testified, upon interrogation by the Board Member, that the value placed on the Briterlite invention by him and Mr. Wagner on March 1, 1913, was $100,000.00. The Member then ruled:

The MEMBER.—I will let the answer stand subject to the objection, and with the understanding I will pass upon the question whether or not it should be received, and I will rule upon it when I dispose of the case; what I said about the brief on the subject applies to this answer as well as any other answer that was given on that subject. Objection sustained. Exception granted and noted. S. J. M. (Tr. p. 50.)

VI.

The Board of Tax Appeals erred in sustaining the objection of counsel for respondent to the admission in evidence of the testimony of the witness George J. McKenzie, concerning the compara-

tive values of the Briterlite invention in 1913 and in 1920.

The witness had testified that he was a resident of Los Angeles and was manager of the Wagner-Woodruff Company and had been connected with that company for the past eighteen or nineteen years; that the company was engaged in the manufacture of lighting fixtures; that he was with the company in the years 1912 and 1913, and the company began the manufacture of the Briterlite fixture in the year 1912; that the Briterlite fixture is a semi-indirect type of lighting fixture—that is, a glass bowl below, an opaque upper reflector; a curved reflecting surface, and the upper reflector was what might be called a concave reflector; that there was one other type of fixture that resembled the Briterlite, known as the Brascolite; that it was similar inasmuch as it had an upper reflector with a translucent bowl, but the opaque top reflector had a perfectly flat reflecting surface as against the concave by the Briterlite, and the upper reflector of the Briterlite was stepped down in such manner as to eliminate any shadow upon the ceiling where the fixture was used as a ceiling type; that the bowl on the Briterlite was suspended from the outside of the reflector, against the Brascolite being suspended probably about two inches from the edge of the reflector, the feature of the Briterlite over the Brascolite pertaining to that method of suspension of the bowl, was that it allowed the bowl to be removed more readily for

cleaning of the bowl and renewing the lamp; that there was a tremendous demand for this type of fixture in the commercial world, because at that time the National Lamp Works, who practically controlled the distribution of electric lamps, changed their type of lamp to what is known as the nitrogen or gas-filled bulb, which was such a pure white glaring light that it was absolutely essential that it be covered in some way as it was blinding to look at the actual bulb of the lamp, and everybody that was manufacturing lighting fixtures was attempting in some way to develop something that would eliminate that glare and make the fixture livable; that up to that time all fixtures with possibly one or two exceptions were what were called direct light fixtures—direct reflector, with possibly multiple reflectors,—anywhere from three to ten to a fixture, with the lamp exposed, because the carbon or Tungsten lamps were in use, which had more of a reddish yellow case to them and were not objectionable to look at; that the other type of fixture which was on the market and had been marketed successfully was known as the Finish (Phoenix) Light, which had a similar principle except it was all glass—the upper reflector as well as the lower were glass; that those were the only two fixtures that were developed and marketed, to the witness's knowledge, to any great extent; that the retail selling price of the Briterlite during the years 1912 and 1913 was based on the cost of the labor and material as a basic cost of

the fixtures and fifty per cent of such basic cost was added to determine the overhead, and the retail price was determined by doubling both amounts; that the public and trade demand for the indirect lighting fixtures, such as the Briterlite and Brascolite, was very great during the years 1912 and 1913 and was much greater in those years than during the year 1920 when new patents were developed which made the cost of installation of the new type much cheaper and had a much greater utility value than did the Briterlite or the Brascolite; that the Briterlite invention and patent was acquired by Wagner and Woodruff during the year 1920. The witness testified that he sold fixtures during the year 1911, and for seven years prior to that he was in charge of the silverware department and lamp department of D. C. Percival and Company, wholesale jewelers; that he was familiar with the demands for indirect lighting fixtures in 1912 and 1913, and was familiar with the rate of profit resulting from the manufacture and sale of the Briterlite fixtures during the years 1912 and 1913.

Further testimony of the witness, objections of counsel for respondent, and the ruling of the Board Member will more fully appear as follows:

> Mr. KOSTER.—What would you say would be the comparison of values of the Briterlite invention and the exclusive rights to manufacture and sell thereunder as between 1920 and 1913?

Mr. WILSON.—That is objected to, your Honor; it is wholly immaterial; we are not concerned with any 1920 value,—it is wholly immaterial whatever value this invention increased or decreased after 1913, we are not concerned, nor does the disposition of this case in any wise hinge upon 1920 value,—it was sold in 1920 for an estimated figure of eighty-five thousand dollars, that is not in dispute what it was sold for in 1920.

Mr. KOSTER.—If that fixture had a value of eighty-five thousand in the year 1920 and this witness can testify as to conditions existing between those times and at those times and can compare the values as he sees them in 1920 and 1913, I should think that that would be admissible, at least for a comparison with values existing between those two dates, or at those two dates.

Mr. WILSON.—Well, in answer to that statement, your Honor, I would suggest this: This witness has been asked right from the start of his examination concerning the first types of lighting fixtures, and then he explained in some detail how the demand for indirect lighting fixtures grew and explained briefly the difference between the Brascolite and the Briterlite, and testified that he was familiar with the demand for indirect lighting in 1912 and 1913; now, every word of that testimony goes to lighting fixtures we are concerned here with

a certain property right, namely an invention; we are not concerned here with value of fixtures as merchandise; we are concerned here with fair market value of a property right, namely value of an invention as of March 1, 1913; I submit the witness has not been qualified to testify at all either as to a figure representing the fair market value at March 1, 1913, or a comparative figure—you can not compare a value or fixture with the value of an invention; they are altogether different rights and property.

The MEMBER.—Read the last question, Mr. Reporter.

(The pending question was thereupon read by the Reporter.)

The MEMBER.—He may answer.

Mr. WILSON.—May I have an exception?

The MEMBER.—Exception noted.

Mr. KOSTER.—Will you read that question a little louder, Mr. Reporter?

(The pending question was thereupon read by the Reporter.)

The WITNESS.—I do not quite understand that question; who is putting this question?

Mr. KOSTER.—This is the question that was asked you before you were interrupted in your answer.

The MEMBER.—You may re-state the question to the witness; he says he does not understand it.

(By Mr. KOSTER.)

Q. Will you state whether or not the value of the Briterlite invention and the exclusive rights to manufacture and sell thereunder were greater or less in 1920 than in 1913 and 1912?

A. They were less in 1920 than in 1912; is that the question?

The MEMBER.—Now, do you object to this question and answer?

Mr. WILSON.—Yes, sir, on the grounds heretofore stated, your Honor.

The MEMBER.—You move to strike it out?

Mr. WILSON.—Yes, I move to strike it out.

The MEMBER.—The answer will be allowed to stand, subject to the objection and the motion, and the question of admissibility will be disposed of at the time of the decision in the case, and the exception will be reserved for the party against whom the ruling may go. The objection is sustained. The motion is granted. Exceptions are granted and noted. S. J. M.

(Tr. pp. 54 to 57.)

VII.

The Board of Tax Appeals erred in sustaining the objection of counsel for respondent to the admission in evidence of the testimony of the witness Max L. Gordon, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The witness had testified that he was a resident of Los Angeles, and had been engaged in the light-

ing fixture business and was one of the owners of the California Fixture Company from 1909 to 1912, and the owner of the National Fixture Company from 1912 to 1925; that prior to 1909 he was also engaged in the lighting fixture business and had been in that business practically all his life; that he was familiar with the type of lighting fixtures in use during the years 1912 and 1913; that he sold the Brascolite fixture quite extensively in his business, and was also engaged in the manufacturing of lighting fixtures and was familiar with the cost of manufacturing lighting fixtures; that he was familiar with the demand for lighting fixtures, particularly in California, and the company with which he was connected had three traveling salesmen that canvassed the lighting fixture trade all over the country; that the general method for arriving at list price—sales price for fixtures—which method prevailed in the fixture business during the years 1912 and 1913, was to take the cost of material plus the labor, add fifty per cent for general overhead, shop expense, and so on, and double that cost; that he knew the Briterlite was being manufactured and sold in 1913; that he knew the light, and would liked to have had the privilege of selling the Briterlite; that he knew the selling price and the cost of manufacture of the Briterlite fixture; that the Briterlite fixture was superior to the Brascolite fixture in 1913 and could be readily sold in competition with the Brascolite.

Further testimony of the witness, objections of counsel for the respondent, and the ruling of the Board Member will more fully appear as follows:

Mr. KOSTER.—What, in your opinion, was the fair market value as of March 1, 1913, of the Briterlite invention and the exclusive right to manufacture and sell under that particular invention?

The MEMBER.—What is your objection; what are the grounds for the objection?

Mr. WILSON.—The witness is now asked to answer a question regarding the fair market value of a certain property right, namely an invention. This witness has testified, as your Honor has heard, the length of time he has been in business, the nature of that business; he has testified he was familiar with this Briterlite fixture; he has not said anything about the invention as a property right; he has been talking about the Briterlite fixture, in answer to my questions a moment ago he stated that his firm had never sold the Briterlite, because they could not; that he was familiar with the fixtures and knew that it was in production and recognized it, that is, the company, as a competitor. Now, nowhere, either in that examination or in the witness' direct examination has there been a word stated about the invention property right, the fair market value of which is here now being sought to be established; the witness is wholly unqualified

thus far to give any testimony in regard to the value of the invention—the property right.

The MEMBER.—Do you understand the question that is before you now?

The WITNESS.—Yes, sir.

The MEMBER.—You may answer, subject as to this value?

A. I can.

Q. You say you can?

A. I can.

The MEMBER.—You may answer, subject to the objection of counsel for the respondent. Objection sustained. Exception granted and noted. S. J. M.

(Tr. pp. 61, 62.)

The witness then testified that the fair market value of the Briterlite invention on March 1, 1913, was $100,000.00. He then testified as to the basis used by him in determining this value as follows:

Mr. KOSTER.—Upon what, I will ask you, would you base that opinion of value, Mr. Gordon?

A. We were selling, starting in from about 1913, about 3,000 National lights a year, and there was no comparison, as far as the National Light and Briterlite was concerned in appearance, because, for the reason, I would safely say, and will readily make this statement, when we would submit both samples on some particular contract, and invariably the Brascolite

would win; the exception in that case was the Rosslyn Hotel, we happened to win, but in most cases the Brascolite, it was easier to clean——

Q. Are you referring to Brascolite?

A. I am referring to the Briterlite; it was easier to clean, to detach a bowl from the plate, and it was a better looking fixture than ours; of course, we are out of business now.

Q. What factors did you use in computing your value of seventy-five to one hundred thousand dollars?

A. Well, I would have been willing to pay a dollar per unit as a royalty, if I could have got the exclusive right to it, even for California on account of so many new and old constructions going on on buildings, and so on.

Q. What was your estimate of the number of units that might be sold under the right?

A. I would safely say ten thousand a year.

Q. For what period of years?

A. Well, the economic life of a thing of that kind, I would say ten years.

Q. Then, what would you do,—I am trying to find out——

A. Well, we would still sell it, I, as a manufacturer, would take advantage of it, if I would pay the seventy-five thousand, would take advantage of the rest of the time for myself, as additional profit; if I were to sell 500, I

would consider that 500 as additional profit to my concern.

Q. Now, in arriving at the value you place upon this, what other factors do you use, and how do you apply those factors; you have stated now the number of units you estimated would be sold, the royalty rate; just explain how you compute your value.

A. What do you mean by "value"?

Q. You stated the value was seventy-five to one hundred thousand dollars?

A. Yes, I estimate the value so many fixtures a year,—say ten thousand a year, at a dollar per fixture, is ten thousand dollars; if I could buy that patent for seventy-five thousand, why I would think it would be a good investment, and that would be, when I say seventy-five thousand, I refer to the Pacific Coast alone, —my experience,—I have not sold any fixtures back east until 1923, then I had three men on the road.

(Tr. pp. 63 to 65.)

VIII.

The Board of Tax Appeals erred in sustaining the objection of counsel for the respondent to the admission in evidence of the testimony of the witness Jerome Fugate, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The witness had testified he resided in Los Angeles and was at that time a partner in the Wagner-

Woodruff Company and had been a partner for the past three years; that prior to that time he was associated with the Myberg Company of Los Angeles in the capacity of selling their product and had been employed by that company about seven years; that prior to that time he was in the business of designing and manufacturing lighting fixtures for himself at Tacoma, Washington, and prior to that time he was manager of the Mullins Electric Supply Company at Tacoma, Washington; that during the years 1912 and 1913 he was associated as a salesman with the W. G. Hudson Company of Los Angeles, selling lighting fixtures, and during the years 1909, 1910, 1911 and 1912 he was with the Capital Electric Company of Salt Lake City, which company was engaged in the designing, manufacturing and distribution of lighting fixtures and supplies; that he was traveling auditor of the Capital Electric Company, which was a very large concern and conducted a very extensive jobbing and manufacturing business; that he was familiar with the types of lighting fixtures in existence in 1912 and 1913; that the Brascolite fixture was by far the best know fixture, and following that came the Briterlite fixture manufactured in Los Angeles and then the Phoenix light; that the Briterlite could easily be sold in competition with the Brascolite because of the superior features which it had from a selling standpoint.

Further testimony of the witness, objections of counsel for the respondent, and the ruling of the Board Member will more fully appear as follows:

Mr. KOSTER.—Assuming that you had, or that you could purchase at March 1, 1913, or thereabouts, a right, a patent or an invention, together with the exclusive right to manufacture and sell that patent or invention covering a lighting fixture, which was superior to Brascolite at that time; what would you consider, or what in your opinion would be the fair market value of a product (property) at that time, of the product (property) that was being offered to you for sale or for purchase?

Mr. WILSON.—That is objected to, your Honor, for the reasons which certainly must be obvious; in the first place the question is predicated upon the assumption that the Briterlite invention was, in fact, superior to any other product, namely Brascolite, concerning which we know absolutely nothing. In other words, the answer, even if given,—even if an answer were made here would most certainly be subject to a motion to strike on the ground that it is wholly incompetent, irrelevant and immaterial. The second ground of the objection is that the question assumes the value of a certain property right which is patented. Now, the evidence in this case clearly shows that this invention was not patented on March 1, 1913, at

all, the application was not made until in 1914 and the patent issued in 1915, so that the hypothetical question does not cover the facts thus far developed in this case.

The MEMBER.—In the first place, did you understand the question?

The WITNESS.—I think I do, sir.

The MEMBER.—Do you want it read again?

The WITNESS.—I would prefer to have it read again.

The MEMBER.—Read the question.

(The pending question was thereupon read by the Reporter.)

The MEMBER.—In the first place, can you answer that question; that is something you can answer yes or no; I am asking you if you can answer that question; I would like to have you answer yes or no.

The WITNESS.—Yes, sir.

The MEMBER.—You can answer that question?

The WITNESS.—I think so.

The MEMBER.—The answer will be taken, subject to the objection. Objection sustained. Exception granted and noted. S. J. M.

(Tr. pp. 69, 70.)

The witness then testified that the fair market value of the Briterlite invention on March 1, 1913, would have been at a minimum $100,000.00, as follows:

The WITNESS.—Well, I would first, of course, have to base the value of such a right to manufacture on what the supply and demand for the product in question would be. The only thing I would have to base such an estimated value upon would be, naturally, upon my knowledge of the distribution possibilities, based on past experience of a similar type fixture in the United States, in general, distribution possibilities, in other words. I would say that in my experience with the Capital Electric Company of Salt Lake City, where we operated this chain of twenty-one stores, that I made reference to using that as a basis; the average sales of those institutions ran very close to ten thousand a month; they were not large institutions,—about half of their sales were based upon commercial fixtures,—store lighting fixtures,—office building fixtures, and so on. This Brascolite had absolutely been the only unit that could be sold in this territory; coming into Los Angeles, I found the Briterlite invention here in use and it offered a highly competitive fixture which could readily be sold in competition with the Brascolite, and it would have been little or no problem whatever for any manufacturer to have easily reached a distribution of one hundred thousand units per year in the United States. I would base that upon the averages of sales for an average store,—an average institution running around

one thousand units per year; it would not be very difficult to obtain one hundred of such distributing points in this country; I would say a very fair market value for the privilege of manufacturing such a fixture would have been, at a minimum, one hundred thousand dollars. (Tr. p. 71.)

Upon cross-examination the witness testified as follows:

Mr. WILSON.—Now, keeping out of your mind, Mr. Fugate, the information and knowledge you have at the present time with regard to this development of this Briterlite and Brascolite, and putting yourself,—placing yourself back, figuratively speaking, to on or about March 1, 1913, do I understand you to testify that you would have on that date,—you would have been willing on that date to have paid one hundred thousand dollars for the Briterlite invention?

A. I did. (Tr. p. 75.)

IX.

The Board of Tax Appeals erred in sustaining the objection of counsel for the respondent to the admission in evidence of the testimony of the witness Frank N. Cooley, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The witness had testified that he resided in Los Angeles and was at that time engaged as a lighting specialist for the Graybar Electric Company,

formerly the Western Electric Company, and had been in that position for the past eighteen years and four months, supervising all lighting unit lines of lighting materials; that prior to that time he was employed in the general lighting fixture business; that in 1912 and 1913 he was employed by the Western Electric Company as a lighting specialist; that at that time the Western Electric Company had sixty-two houses in the United States, and at the present time have seventy-six houses, doing approximately ninety to one hundred million dollars of business during the year; that he was familiar with the demands of the trade in 1912 and 1913 for an indirect lighting fixture, and that during those years the demand for that type of fixture became very noticeable; that that demand came about by reason of the development of the Type-C, gas filled Mazda lamp; that previous to that the incandescent lamp business was confined to the carbon lamp, the filament of which was made out of carbon bamboo and gave off a rather reddish or yellow light, but with the development of the gas filled lamp, the brilliancy of the filament was so much greater that it was necessary to cover the light in such a way that it would not cause glare, resulting in eye-fatigue; that he knew the prevailing rates at which manufacturing under patent rights were secured in 1912 and 1913, due to the fact that he had watched the development of the lighting fixture business since 1899 and worked for about ten years on sales work and specialty

work for the balance of twenty years; that the demand for the indirect lighting fixtures began to develop in 1911 or 1912; that his company did not start selling the indirect line until about 1913 or 1914.

Further testimony of the witness, objections of counsel for the respondent, and the ruling of the Board Member will more fully appear as follows:

> Mr. KOSTER.—Asuming that you were able to purchase an invention with the exclusive rights to manufacture and sell the product covered by that invention, and that invention was of an indirect lighting fixture which was superior at that time, and by "that time" I mean on or about March 1, 1913, to the other indirect lighting fixtures with which it might compete. What would you—what, in your opinion would be the fair market value of such an invention with the rights,—exclusive rights, pertaining thereto, be as of March 1, 1913?
>
> Mr. WILSON.—That is objected to first on the ground that the question is worded, and subject to the same criticism as has been directed to that question asked the previous witnesses; it contains first of all an assumption on the part of the witness—strike that—it contains first of all an assumption that some indirect lighting system, not described at all as the Briterlite or any other particular make, is superior, and was at that time superior, to everything else on the market, and secondly

that the market value is for a thing which either is patented, or which gives exclusive rights of manufacture, which incidentally has not been shown here at all to apply to the Briterlite there, and lastly it is subject to the objection that it is so uncertain and indefinite as to be of no value whatever in the matter of arriving at a figure which might represent the fair March 1, 1913, value of the Briterlite invention. This witness has been asked, simply, "Assuming that you could purchase some patent or protected invention of an indirect lighting fixture which is superior to others,"—now there has been no testimony or evidence here tending to show at any time today that this Briterlite fixture was the best on the market; as a matter of fact the record is almost barren of any testimony or evidence as to just when this article was put on the market, and in the absence of such evidence, together with the ambiguity contained in the question, the respondent urges the objection on the grounds just stated.

The MEMBER.—Objections sustained.

(By Mr. KOSTER.)

Q. Assuming that the Briterlite——

(By the MEMBER.)

Q. Just a moment; Mr. Cooley, were you familiar with this Briterlite?

A. I was not at that time.

Q. Did you ever become familiar with it?

A. During the last five or six years only.

Q. In other words, you did not know the Briterlite until the last five or six years?

A. Yes.

Q. And in the last five or six years you have been familiar with it?

A. Yes.

Q. You have seen it in operation?

A. Yes, sir.

Q. And you haxe examined it?

A. Yes, sir.

The MEMBER.—Proceed.

(By Mr. KOSTER.)

Q. Assuming that the Briterlite invention carried with it the exclusive rights to manufacture and sell the Briterlite fixture, which was a lighting fixture superior to other indirect lighting fixtures in existence on or about March 1, 1913, what in your opinion would be the fair market value as of March 1, 1913, of that Briterlite invention?

The MEMBER.—Just a moment. Have you finished your question?

Mr. KOSTER.—Yes.

Mr. WILSON.—That is subject to the same objection as heretofore made, coupled with the further objection that there has been no proper foundation laid for the question at all; the witness has not been qualified to testify to anything like that, which he is now asked to give.

Mr. KOSTER.—If the Board please, this witness has been in the lighting fixture business since '99; he has had general supervision of a lighting company which was nationally known, operating 62 stores at that time, he knew the fixture business; he knew the fixtures being developed and sold; he knew the demand for fixtures around March 1, 1913; he knew there was a demand for that indirect lighting fixture, brought about by reason of the invention and marketing of a certain new Tungsten light; he knew the prevailing rates under which rights to manufacture were offered to manufacturers for patented articles; certainly if a hypothetical question can be put to him stating the facts which we believe our testimony in the case has proven, that he is qualified to give his opinion as to the value of that property, based on the facts which are presented to him in the hypothetical question.

(By the MEMBER.)

Q. Do you know what lights or fixtures of the character of the Briterlite were being manufactured in 1912 and 1913?

A. Yes, I knew of the Brascolite; I knew of the Phoenix light, and I knew also of the Perfect Light, which was made in Seattle, all of the same order, having a reflecting surface back of them, and since then there has been any number of units, in the last few years, developed along those lines.

Q. Do you know of any others that were being manufactured in 1912 and 1913?

A. Those three are the only ones I know at that time.

Q. Is it possible there were some other manufacturers that you did not know about?

A. There might have been.

Q. That there were others manufactured that you did not know about?

A. Yes, there might have been.

Q. You would not want to say that those were the only kind being manufactured in 1912 and 1913?

A. No.

Mr. KOSTER.—Those assumptions which we have made in the hypothetical question, if your Honor please, we feel were supported by testimony that has gone before; we submit that we should be entitled to use the facts which we believe have been proven by our testimony in the hypothetical question which we are presenting to this witness who is qualified to answer the question.

The MEMBER.—I will ask you to re-state your question now, Mr. Koster.

Mr. KOSTER.—May I have it re-read, if the Board please, by the Reporter?

(Thereupon the Reporter read the hypothetical question propounded to the witness by Mr. Koster.)

The MEMBER.—Is that the question you want answered?

Mr. KOSTER.—That is the question.

The MEMBER.—Do you understand the question?

The WITNESS.—I do.

The MEMBER.—I will ask you now, can you answer that question,—I am not asking you to answer it at present; I am asking you to tell me whether you can answer it or not.

The WITNESS.—Yes.

The MEMBER.—Do you know whether or not the Briterlite was superior to the other makes of light that you state were being manufactured in 1912 and 1913, with which you were then familiar?

The WITNESS.—From information which I have had in the last five years, I believe that the Briterlite is of better design than the Brascolite or other lights that I had come in contact with up to that time.

The MEMBER.—You may answer, subject to the objection of counsel for the respondent. Objection sustained. Exception granted and noted. S. J. M.

The WITNESS.—I would say a fair market value of that invention is worth about $300,000.

(By Mr. KOSTER.)

Q. Will you state upon what you base your opinion of that value, Mr. Cooley?

A. I would base that on an estimate of possibly five thousand units in this territory, which would be approximately fifteen thousand units for the Coast, which, under our system of estimating the entire country is ten per cent of the entire country's demand for that class of stuff, and that would give about 150,000 units. From experience that I have had in attempting to market an invention, I find that the prevailing royalty basis is approximately five per cent of the manufacturing cost; the manufacturing cost of one of those units, I would say, the average cost, would be about ten dollars, which would be about fifty cents a unit, at fifty cents a unit, a million and a half units would figure around $750,000. In my estimation, due to the fact that you have ten years of practical life of the patent,—the other seven you might be getting started and competition may come up, but by discounting that fifty per cent it still brings it down to $375,000; that is how I roughly estimate the market value of the invention.

(By the MEMBER.)

Q. As of March 1, 1913?

A. Yes, because that was the time when it was very valuable; it is not now, because of all of the competition.

(Tr. pp. 79 to 86.)

WHEREFORE, for the many manifest errors committed by the Board, the petitioner through her attorneys, prays that the final order of said Board of Tax Appeals be reversed; and for such other and further relief as to the Court may seem meet and proper.

Dated, October 1, 1932.

CLAUDE I. PARKER,
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Attorneys for Petitioner.

[Endorsed]: Filed Nov. 7, 1932. Paul P. O'Brien, Clerk.

No. 6951.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Alma I. Wagner, Executrix of the Estate of Robert G. Wagner, Deceased,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

Introduction.

This is an appeal from a final order of the United States Board of Tax Appeals affirming the action of the Commissioner of Internal Revenue in determining that there is a deficiency in income taxes for the year 1920 in the amount of $13,380.44.

On October 19, 1927, the Commissioner of Internal Revenue, respondent, notified the petitioner by registered mail, in accordance with the provisions of section 274 of the Revenue Act of 1926, that his investigation of the

income tax return filed by Robert G. Wagner for the year 1920 disclosed a deficiency in tax in the amount above stated. The petitioner, as executrix of the Estate of Robert G. Wagner, deceased, filed a petition to the United States Board of Tax Appeals, contending that the Commissioner erred in his determination. Thereafter the proceeding came to trial before the Board and on June 26, 1931, the said Board of Tax Appeals promulgated its findings of fact and opinion, which are reported in 23 B. T. A. 879. On June 29, 1931, the said Board entered its final order sustaining the Commissioner's determination. Appeal from this order is brought to this court by petition for review filed December 16, 1931, pursuant to the provisions of sections 1001-1003 of the Revenue Act of 1926.

Question Presented.

During 1920 Robert G. Wagner received $42,500.00 from the sale of his one-half interest in a patent covering an invention known as Briterlite. Briterlite was invented by said Robert G. Wagner and his associate, Ernest J. Schweitzer, in 1912 and he claimed that the fair market value of said invention on March 1, 1913, exceeded the proceeds received from its sale and that, therefore, no profit was realized from said sale. The Commissioner contended that the invention had no value as of March 1, 1913, and that, therefore, the entire amount received in 1920, of $42,500.00, was taxable as profit. The Board of Tax Appeals concluded that the evidence does not establish a fair market value for said invention as of March 1, 1913. The question therefore is whether there

is any evidence or support for the Board's conclusion, or whether the evidence conclusively proves a fair market value of said invention as of March 1, 1913. There is also a question as to whether the Board erred in excluding certain evidence as to said value.

Statute Involved.

Revenue Act of 1918:

> "Section 202(a)—That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis shall be—(1) in the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; . . ."

Statement of Facts.

The following statement of facts contains the *findings of fact* set forth in the Board of Tax Appeals decision in this case [R. 14], supplemented by references to the transcript of record:

The petition is filed in the name of Alma I. Wagner, as executrix of the Estate of Robert G. Wagner, deceased. Robert G. Wagner is hereinafter referred to as the decedent.

The decedent was an individual with office at 830 South Olive street, Los Angeles, California.

In 1911 the decedent and one Ernest J. Schweitzer were the owners of the stock of the Wagner-Woodruff Corporation, a corporation engaged in the business of manufacturing and selling electric lighting fixtures in Los

Angeles. About that time, due to the fact that a new type of gas light was brought out which was very bright, several kinds of indirect electric lighting fixtures appeared on the market. [R. 53, 75, 78 and 79.] Among these were the Brascolite, manufactured by the St. Louis Brass Works, and the Phoenix Light. Most of the commercial houses, General Electric, Edison Co., and others were putting in these indirect lighting fixtures. In 1912 and 1913 the Brascolite was the most popular one of these types of fixtures and was in great demand. At that time the Brascolite had been installed in a great many commercial buildings in Seattle, Denver, Salt Lake City, Chicago, Minneapolis, Detroit and the important eastern cities. This fixture is still in great demand. [R. 29, 30, 53, 58, 78, 79.]

This Brascolite fixture was an indirect lighting unit having a translucent globe inverted and a reflecting pan above it.

In 1912 Schweitzer and the decedent, working in the factory of the Wagner-Woodruff Corporation, invented an indirect electric lighting fixture which they called the Briterlite. This was a lamp mounted in a globe of translucent material and having above it a downwardly reflecting reflector of curved contour so as to diffuse the light downward. These lights were being manufactured and sold to a very limited extent in 1912 and 1913. In January or February, 1913, the decedent and Schweitzer had obtained a contract for the production and installation of a number of "Briterlite". [R. 29, 33, 35, 36, 51, 52.]

Schweitzer and the decedent in the latter part of 1912 consulted Frederick S. Lyon, an attorney at law, who, at that time, had been engaged for about 20 years in practicing exclusively in patent, trade mark and copyright matters, and who had represented decedent in a number of patent matters. Lyon caused an examination of the records of the patent office to be made and rendered to Schweitzer and the decedent an opinion or report as to the patentability of the Briterlite invention. He advised Schweitzer and the decedent that the Briterlite did not infringe the original Guth patent, which was the patent covering the Brascolite. The Guth patent had been originally in litigation and the original claims were held to a certain limitation. Subsequently, an application was made by the owner of the Guth patent for a reissue or amended patent on the Guth invention and a reissue was granted. The result was that while the Guth patent was sustained generally the rights of the decedent and Schweitzer could not be cut off because they were intervening rights, the decedent and Schweitzer having invested their money, made their application for patent, and gone into actual manufacture of the Briterlite. Decedent and Schweitzer were thus able to continue in the manufacture and sale of the Briterlite without regard to the fact that the reissue of the Guth patent shut out others who were not licensed. The only fixture in competition with the Brascolite and which did not infringe the Guth patent was the Briterlite, because of the intervening rights of the decedent and Schweitzer. [R. 29, 30, 31, 33.]

One of the material differences between the Briterlite and the Brascolite was that the upper reflecting surface

of the Brascolite or Guth patent was flat. The original Guth patent was limited to a flat upper reflecting surface and to the patent arrangement of the other reflecting surfaces with relation to it. The Briterlite differed essentially in that it had a curved pan at the top. It was not within the scope of the original Guth patent, although the reissued Guth patent did not limit the Guth invention in that same manner. The Briterlite also had three hooks on the bowl and the bowl could be more easily removed than the bowl on the Brascolite. The Briterlite was an improvement over other fixtures of the same type and could be sold readily in competition with them. [R. 63, 64, 67, 71, 72, 84.]

An application for patent covering the Briterlite fixture was filed some time during the year 1914 and a patent was thereafter granted about September 21, 1915.

The Briterlite was made in about eight different sizes and styles. In 1913 the best seller sold for from $18 to $20. In computing the sales list price for the Briterlite the cost of labor and material was taken as a basis cost and 50 per cent of this amount added for overhead. The retail selling price was double that amount. [R. 35, 54, 58.]

In 1920 the demand for these indirect lighting fixtures was not as great because a new type of glass had been invented which was thin in texture so as to allow maximum rays of light to pass entirely through the glass. This was very cheap to market. [R. 54, 57, 64, 86.]

In 1920 the decedent and Schweitzer sold the patent on the Briterlite fixture to the Wagner-Woodruff Cor-

poration for $85,000. They each owned a one-half interest in this patent. The respondent determined that the decedent derived an income from this transaction in the amount of $42,500.00.

In addition to the above facts, we respectfully submit that the evidence conclusively establishes as a fact that the fair market value as of March 1, 1913, of the Briterlite invention was at least $100,000.00.

Assignments of Error.

The petitioner assigns the following errors:

1. The Board of Tax Appeals erred in holding that the Briterlite invention had no fair market price or value on March 1, 1913.

2. The Board of Tax Appeals erred in holding that the evidence does not prove or establish a fair market value for said Briterlite invention as of March 1, 1913, there being evidence to the contrary in the record and from the testimony of witnesses.

3. The Board of Tax Appeals erred in not redetermining the deficiency in favor of the petitioner for the year 1920 and against the Commissioner.

4. The Board erred in excluding evidence of values, as set forth in the amended assignments of error filed in this proceeding.

ARGUMENT.

An Invention Is Property Which Is Marketable and Its Value Determinable.

Since the Board's decision indicates that there is difficulty in determining exactly the nature of the property right, if any, which is to be given a value as of March 1, 1913, we are devoting the first sections of this brief to the establishment and explanation of the property rights represented by the Briterlite invention, to prove that on March 1, 1913, Messrs. Wagner and Schweitzer, the inventors, had not only a mere invention but also certain exclusive rights tantamount to the exclusive rights made perfect and absolute by patent.

The Board of Tax Appeals, in its opinion filed in this proceeding, stated [R. 19]:

> "Petitioner contends that an invention, prior to the time the patent is issued thereon and even prior to the date that an application for a patent is filed, is property capable of being valued, citing, among other cases, Hershey Manufacturing Co., 14 B. T. A. 867; Hendrie v. Sayles, 98 U. S. 546, and Butler v. Ball, 28 Fed. 754. However, in the view we take of the evidence in this proceeding, we do not deem it necessary to determine whether or not this contention of petitioner is correct."

We respectfully submit that an invention is property and that it is marketable and can be valued.

Under section 8, article I, of the Constitution of the United States, Congress is granted the power to make all laws which shall be necessary and proper to promote progress of science and useful arts by securing for limited

times to authors and inventors the exclusive rights to their respective writings and discoveries. By virtue of this authority, Congress enacted laws regarding the issuance of patents and copyrights, providing thereby for the protection of the inventor an exclusive right to use, manufacture and sell his invention for a period of 17 years after issuance of patent.

Revised Statute, section 4886 (29 Stat. 692; U. S. Codes Ann. Title 35, sec. 31), provides:

> "Inventions patentable. Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

These laws presuppose the existence of an invention, a property which by their mandate they protect, in that by their provisions they restrain others from the manufacture and use of that invention.

The general law declares beforehand that the right to the patent belongs to him who is the first inventor, even before the patent is granted; therefore, any person who, knowing that another is the first inventor, proceeds to construct a machine, acts at his peril, with a full knowl-

edge of the law. Inventions, lawfully secured by letters patent, are the property of the inventors and, as such, the franchise and the patented product are as much entitled to legal protection as any other species of property, real or personal. *They are, indeed, property even before they are patented,* and continue to be such until the inventor abandons the same to the public. (*Butler v. Ball,* 28 Fed. 754.)

A patent is nothing more than the grant of certain protection. It is not the grant of any property. The government parts with nothing by the patent. It loses no property. Its possessions are not diminished. The patentee, so far as the present use is concerned, receives nothing which he did not have without the patent, and the monopoly which he receives under the patent is only for a limited period. His invention is his absolute property. He may withhold the knowledge of it from the public and he may insist upon all the advantages and benefits which the statutes promise to him who discloses to the public his invention. (*U. S. v. American Bell Telephone Co.,* 167 U. S. 226, 249, 250; see, also, *Victor Talking Machine Co. v. The Fair,* 123 Fed. 424; *Fuller v. Berger,* 120 Fed. 274: "The inventor's right to make, vend and use his device does not come from the patent law. It is his natural right." *Motion Picture Patent Co. v. Universal Film Co.,* 243 U. S. 502.)

The term "property" as used in the statute (section 202(a), Revenue Act of 1918, *supra*) was not intended to be applied in a restricted sense. As stated by the Circuit Court of Appeals in the case of *Commissioner v.*

Stephens-Adamson Mfg. Co., 51 Fed. (2d) 681 (affirming 16 B. T. A. 41):

> "The word 'property' as used in the above referred-to sections of the revenue acts, should not be given a narrow or technical meaning. In Lynch v. Alworth-Stephens Co., 267 U. S. 364, 369, 45 S. Ct. 274, 275, the court said: 'The general provision * * * is that the deduction from gross income shall include a reasonable allowance for the "exhaustion * * * of the property."' *There is nothing to suggest that the word 'property' is used in any restricted sense.*"
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> * * * * * * * *
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> "That one who has secured through assignment the application for a patent, or who has himself made a discovery of a patentable article, has a property right therein, is established by the facts that he may (35 U. S. C. A., sec. 47) sell and assign his application for a patent. Sayler v. Wilder, 10 Howard 477, 13 L. Ed. 504; Cook v. Sterling Electric Co. (C.C.), 118 F. 45. *We think it a fair definition to say that what may be sold and assigned is property.*" (Italics ours.)

It is a matter of common knowledge that inventions are bought and sold and otherwise dealt in, even before patent is applied for or secured. (See *Stephens-Adamson Mfg. Co.*, 16 B. T. A. 41, where the invention was assigned before patent was applied for.) We believe that the testimony adduced in this proceeding, as recorded in the statement of evidence [R. 27], conclusively shows that an invention may be valued and that the value of the Briterlite invention as of March 1, 1913, was definitely determinable and established. That inventions may be

marketable is a fact of which the courts would undoubtedly take judicial notice. The amount of valuation proved by the evidence will be hereinafter discussed.

The Property Right in an Invention Includes the Inchoate Right to Exclusive Use.

It is established law that an inventor has property which he may assign prior to patent. He has a property interest which he may sell or dispose of in any manner he may desire; and, further, *he has a property interest which carries with it the right to apply* for the protection which the law affords, to give to him an exclusive right for the use, manufacture and sale of his invention. (*Keystone Type Foundry v. Fast Press Co.,* 263 Fed. 99; *Nye Tool & Machine Works v. Crown Die & Tool Co.,* 276 Fed. 376.) As stated in *Hendrie v. Sayles,* 98 U. S. 546, 551:

> "*Bona fide* inventors' *rights* are never derivative, *and they, even before the patent is issued, have the exclusive inchoate right not only to the original patent . . . but to any reissue. . . .* Authorities to support that proposition are numerous and decisive, *and it is equally clear that they may sell, assign or convey the invention, including the inchoate right to obtain the patent* * * *" (Italics ours.)

In the case of *Gayler v. Wilder* (10 Howard 476, 13 L. Ed. 504), the first question considered was whether an assignment of an invention before the patent issued, with a request that patent be issued to the assignee, conveyed to the assignee the legal right to the monopoly subsequently conferred by the patent. The court ruled

that, although it was true that an inventor had no absolute right to exclusive use of his invention until he obtained a patent, *"the discovery of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires."* The court pointed out that although the Act of Congress (Act of 1836) declares that every *patent* shall be assignable in law, the thing to be assigned is the monopoly which is conferred by the patent and that therefore *"when the party has acquired an inchoate right to it, and the power to make that right perfect and absolute at his pleasure, the assignment of his whole interest, whether executed before or after the patent issued, is equally within the provisions of the Act of Congress."*

The Inchoate Right to Exclusive Use Exists From the Time of First Public Use or Sale of the Invention to the Date of Issue of Patent, Provided, Application for Patent Is Made Within Two Years From the Time of Said First Public Use or Sale, and There Is No Abandonment.

Under section 4886 of the Revised Statutes, *supra,* an inventor is allowed two years from the time his invention is first devoted to public use, or on sale, within which to file application for patent. As first inventor and first user of an article, he has the right to exclude others from the use of his invention, provided he files his application for patent within two years from the time of the first public use of the invented article. During that two-year period, therefore, he is vested with that inchoate right to exclusive use of his invention and

he has also the exclusive privilege during that period to file application for patent and to proceed as required by law, to perfect and make absolute his inchoate right. When that right is made absolute, his monopoly or right to exclusive use extends not merely from the date of application of patent, but from the date of first public use or sale of the invented article. (See *Mast, Foos & Co. v. Dempster Mill Mfg. Co.*, 82 Fed. 327; also *Gaylor v. Wilder, supra*, p. 9.)

On March 1, 1913, Robert G. Wagner and Ernest Schweitzer Had the Right to Exclusive Use of Their Briterlite Invention and the Value of the Invention Would and Should Reflect and Include the Value of Those Rights.

The Board of Tax Appeals found as a fact that the lights under the Briterlite invention were being manufactured and sold to a very limited extent in 1912 and 1913, and that in January or February, 1913, Robert G. Wagner and Ernest Schweitzer had obtained a contract for the production and installation of a number of "Briterlite". [R. 16.] The Board also found that an application for patent covering the Briterlite fixture was filed some time during the year 1914 and a patent was thereafter granted about September 21, 1915. [R. 17.] The Board concluded, however, that at March 1, 1913, Robert G. Wagner and Schweitzer did not have exclusive right to manufacture and sell the Briterlite, since no patent had been granted thereon. [R. 19.]

The granting of the patent is *prima facie* evidence that the invention it protects was not in public use or on sale for more than two years prior to the filing of the applica-

tion on which it is based, and that there was no abandonment during that period of the invention. (*Mast, Foos & Co. v. Dempster Mill Mfg. Co.* (*supra*), 82 Fed. 327, 331.) It is therefore obvious that from 1912 to 1914 the inventors had the right to exclude others from the use of the Briterlite invention, and that on March 1, 1913, they possessed the inchoate right to the exclusive use of the Briterlite and had at that time the exclusive privilege of making application for patent covering the Briterlite invention.

In the *Gayler v. Wilder* case, *supra,* the United States Supreme Court held that an assignment of an invention before patent issued and while the assignor was possessed of the inchoate right to a monopoly, carried with it an assignment of the right of monopoly which was made absolute by the later issue of patent. Therefore, if Robert G. Wagner and his co-inventor, Schweitzer, had sold their invention on March 1, 1913, they would have sold not only the new discovery but also the right of monopoly which they then possessed and which became absolute and perfect when the patent issued.

We will hereinafter show that the courts and the Board of Tax Appeals have consistently recognized the right to value applications for patent. In this proceeding the Board endeavors to penalize the taxpayer because he took advantage of the time permitted by law for the filing of application without prejudice to the inventor's rights to patent. Certainly an inventor is vested with the same property right regarding his invention during this two-year period before application for patent as he is after the application for patent is filed and during

the period it is pending before patent issues. The postponement of the filing of application for patent to the Briterlite invention was not only good business policy but also a delay which was actually valuable.

As stated by the United States Supreme Court in the case of *U. S. v. American Bell Telephone Co.,* 167 U. S. 226, 246, 247:

> "Neither can a party pursuing a strictly legal remedy be adjudged in the wrong if he acts within the time allowed, and pursues the method prescribed by the statute. If the statute gives him five years within which to bring an action on a note he cannot be denied relief simply because he waits four years and eleven months. If he has two years after a judgment against him within which to take an appeal he may wait until the last day of the two years. Under U. S. Rev. Stat., paragraph 4886, an inventor has two years from the time his invention is disclosed to the public within which to make his application, and unless an abandonment is shown during that time he is entitled to a patent, and the patent runs as any other patent for seventeen years from its date. He cannot be deprived of this right by proof that if he had filed his application immediately after the invention the patent would have been issued two years earlier than it was, and the public therefore would have come into possession of the free use of the invention two years sooner. The statute has given this right, and no consideration of public benefit can take it from him. His right exists because Congress has declared that it should. It will not do to say that because Congress has declared that seventeen years is the life of a patent, seventeen years is the limit of the possible monopoly;

> *for the same legislation that gives seventeen years as the life of a patent gives two years within which an application for a patent may be made, and during that time, as well as while the application is pending in the department, the applicant has practically, if not legally, an exclusive use.* A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions, not of natural, but of purely statutory, right. Congress, instead of fixing seventeen, had the power to fix thirty, years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public." (Italics ours.)

When it is considered that on March 1, 1913, Wagner and Schweitzer had a patentable invention [testimony of Mr. Lyons, R. pp. 29, 30, and the conclusive presumption raised by actual issue of patent, which cannot be collaterally attacked, *Joseph Adams v. Commissioner,* 23 B. T. A. 71, 103], and that on March 1, 1913, they had the inchoate right to exclusive use of the invention, and that on March 1, 1913, they could, by assigning the invention, have assigned the inchoate right of monopoly which then existed and also the absolute right of monopoly later to be secured by the patent (*Gayler v. Wilder, supra*), *the only reasonable conclusion which could be deduced would be that any sale on March 1, 1913, of the Briterlite invention would have been a sale of the invention together with the exclusive right to manufacture and sell thereunder.* (*U. S. v. American Bell Telephone Co., supra.*)

The mere invention alone, as in a case where it would be deemed to have been abandoned because of failure to apply for patent within two years from date of first public use, would generally be of no value to a prospective purchaser. But that situation did not exist in the instant case. What Wagner and Schweitzer had to sell on March 1, 1913, was not only the Briterlite invention but also a monopoly as to its use.

It is the general policy of the courts to apply a reasonable interpretation to a state of facts rather than an unreasonable one. Since the evidence shows that on March 1, 1913, the Briterlite invention was very valuable, and was patentable, any purchaser of that invention on March 1, 1913, would have perfected the inventors' right by proceeding to patent. Consequently any such purchaser would be purchasing not only the Briterlite invention but the exclusive rights thereunder.

In the case of *Stephens-Adamson Mfg. Co. v. Commissioner* (*supra*), 16 B. T. A. 41, one Stephens invented a belt conveyance carrier in the latter part of 1911. On *November 29, 1911,* he assigned all his rights in this invention to the petitioner for a consideration of one dollar. On *December 4, 1911,* the patent application of Stephens was filed and on *February 5, 1918,* the patent was issued. The Board allowed the petitioner a March 1, 1913, value for the patent application of $500,000.00. Supposing the petitioner in that proceeding had not filed the application for patent until after March 1, 1913, would the rights which he had acquired from Stephens by the assignment of November 29, 1911, have been any the less valuable on March 1, 1913, merely because the

petitioner was taking advantage of the two-year period before filing application for patent? Every bit of the evidence introduced in that proceeding to prove the value of the patent application would have been of equal weight, materiality and applicability as proof of the value of the invention on March 1, 1913, and that value could not possibly have differed from the value determined by the Board as the value of the patent application.

The Courts and the Board Have Recognized That Applications for Patent Are Items of Property Which May Be Valued.

We have been unable to find cases involving exactly the situation existing in this case. However, we believe that the instant case presents a similar proposition to that involved in determining whether applications for patent pending on March 1, 1913, might be valued for depreciation purposes and as a basis for determining gain or loss upon subsequent sale.

In the case of *Individual Towel & Cabinet Service Co. v. Commissioner,* 5 B. T. A. 158, the Board held that applications for patents were property which might be valued. This case has been consistently followed by the Board. (*Empire Machine Co.,* 16 B. T. A. 1099; *Stephens-Adamson Manufacturing Co.* (*supra*), 16 B. T. A. 41; *Keystone Steel & Wire Co.,* 16 B. T. A. 617; *Coca-Cola Bottling Co.,* 6 B. T. A. 1333; *National Piano Manufacturing Co.,* 11 B. T. A. 46; *Hershey Manufacturing Co.,* 14 B. T. A. 867.) The Circuit Court of Appeals affirmed the decisions of the Board on this question in *Commissioner v. Stephens-Adamson Mfg. Co., supra,* 51 Fed. (2d) 681, and *Commissioner v. Hershey Mfg. Co.,* 43 Fed. (2d) 298.

Wagner's and Schweitzer's Rights on March 1, 1913, Under Their Invention Were Equally as Valuable as Their Rights Under an Application for Patent on That Day Would Have Been. And Their Rights Were Tantamount to Rights Under a Patent.

As hereinbefore pointed out, Messrs. Wagner and Schweitzer invented and first devoted to public use their Briterlite invention in the latter part of the year 1912. They, therefore, under the patent laws, had until 1914 within which to file application for patent to protect the future use of their patent and to secure the monopoly which the patent laws would grant them. In 1914 they did file application for patent, and in 1915 patent was granted to them. This proof, in itself, shows that on March 1, 1913, these men had a patentable invention and also substantiates the advice given them by Mr. Lyon, their attorney, prior to March 1, 1913, that their invention was patentable. Messrs. Wagner and Schweitzer, therefore, had, on March 1, 1913, as valuable a property right represented by their invention as an application for the Briterlite patent would have been had it existed at that time.

Therefore, as we have hereinbefore argued in our discussion of the *Stephens-Adamson Mfg. Co.* case, (*supra,* p. 20), if an application for Briterlite patent would have been property subject to valuation on March 1, 1913, had it existed at that date, certainly a property interest of equal standing represented by the Briterlite invention, and the right on March 1, 1913, to apply for a patent of that invention (*Hendrie v. Sayles, supra*), was equally

entitled to be valued as a property right as the application for patent would have been. Even in the case of an application for patent, the property value is in the invention, not in the application.

In the instant case we have the testimony of the inventor's patent attorney to the effect that he caused an examination of the patent office records to determine the patentability of the invention, and that, as a result of that examination, he found the invention to be patentable and so advised Messrs. Wagner and Schweitzer, the inventors. We have his testimony that, inasmuch as the law permitted two years within which to file the application for patent, the application was not made until 1914. [R. 28.] We have also in the case the fact that the patent was issued in 1915. The Briterlite invention was undoubtedly property owned by Messrs. Wagner and Schweitzer—property which they could have sold or otherwise disposed of and property which was exceptionally valuable. (*U. S. v. American Bell Tel. Co., supra.*)

Although this invention was patented at the time it was sold in 1920, the patent added nothing more to the property which was owned by Wagner and Schweitzer on March 1, 1913, than a right to restrain by court action an infringement of others upon the use of the invention and, on March 1, 1913, Wagner and Schweitzer had a right which was granted them by law to protect their invention by applying for this patent. (*Hendrie v. Sayler, supra.*) *They had rights tantamount to rights under a patent.*

In the case of *Stephens-Adamson Mfg. Co.* (*supra*), 16 B. T. A. 41, the invention was perfected and the

application for patent was made in 1911, but the patent was not issued until 1918. Yet, the Board permitted the establishment of a March 1, 1913, value of the patent application, and the Circuit Court of Appeals, in affirming the Board (*supra,* 51 Fed. (2d) 681), stated:

> "It follows, too, that if one may have a property right, within the meaning of the Revenue Act, in and to a pending application for a patent, the basis (cost or fair market value as of March 1, 1913) for determining exhaustion must be fixed as of the day he acquired such right. Section 204(a), (b), Revenue Act of 1926, 26 U. S. C. A., sec. 935. Here the right was acquired in 1911, and, therefore, the fair market value as of March 1, 1913, rather than its cost price, must be used as the basis for determining depreciation or exhaustion."

Wagner's and Schweitzer's rights were acquired in the latter part of 1912 at the time of the first public use of their invention. They were, therefore, entitled to use the March 1, 1913, value of their invention as a basis for determining the gain or loss from the sale in 1920.

In a number of the cases where the Board allowed March 1, 1913, values for application for patent, the patent was not actually issued until several years after that date. (*John Douglas Co.,* 23 B. T. A. 1308—patent not issued until 1915; *Stephens-Adamson Mfg. Co.* (*supra*), 16 B. T. A. 41—patent not issued until 1918; *Individual Towel & Cabinet Service Co.* (*supra*), 5 B. T. A. 158—patent not issued until 1915; *Empire Machine Co.* (*supra*), 16 B. T. A. 1099—patent not issued until 1915-1916.)

In the case of *Joseph H. Adams,* 23 B. T. A. 71 (now pending in Circuit Court of Appeals), the applications filed in 1909 were actually in a state of rejection by the Government Patent Bureau on March 1, 1913, and patent was not granted until 1920. Yet the Board allowed a March 1, 1913, value of the applications for patent of $750,000.00.

It appears indisputable that if the Board could determine a value for the patent applications in the Joseph H. Adams case under the facts which therein existed, and in the other cases hereinbefore mentioned, the Board committed grave error in refusing to determine a value as of March 1, 1913, of the Briterlite invention.

The Evidence Is Sufficient to Establish the Fair Market Value as of March 1, 1913, of the Briterlite Invention.

The witnesses (whose competency and qualifications we will hereinafter discuss) introduced in this proceeding before the Board supported their opinions of value by careful consideration of all factors entering into the determination of value of an invention. Either the witness was personally familiar with those factors as they existed on March 1, 1913, or he was advised thereof by proper hypothetical questions.

The superiority of the Briterlite over other lights was established [R. 17, 63, 64, 67, 71, 72, 84]; the demand on March 1, 1913, and the expected future demand, of the Briterlite type of light was established, as was the reason for that demand explained [R. 15, 18, 53, 54, 57, 64, 75, 78 and 79]; the patentability of the invention

was established [R. 29, 30, and presumption raised by actual issuance of patent—also proof of general reputation and understanding in the trade that Wagner and Schweitzer had a patentable invention, R. 76] (see *Joseph H. Adams,* 23 B. T. A. 71); the rate of profit on manufacture of the Briterlite was established [R. 18, 35, 54, 58]; the expected royalty rate under licensing agreements was established [R. 64, 85]. The witnesses gave consideration to these factors in arriving at their opinion of the March 1, 1913, value of the Briterlite invention.

That it was proper that these factors be considered has frequently been established by judicial decision. In the case of *Sumter Coca-Cola Bottling Co.,* 7 B. T. A. 890, the Board recognizes the testimony of an expert witness, because he was familiar with the factors entering into the determination of the value of a franchise. The Board stated:

> "Charles V. Rainwater, secretary and treasurer of the Coca-Cola Bottling Co. of Atlanta, which controlled the bottling rights for Coca-Cola in a number of states, testified that he had been such secretary and treasurer since 1906 and had supervision of the making and approving of all contracts and subcontracts involving the right to bottle and sell Coca-Cola in the territory controlled by his company. He was familiar with the amount of Coca-Cola syrup consumed in each territory and the profits realized by the bottlers, and had bought and sold franchises on his plants. He stated that originally selling rights for Coca-Cola were given away in order to induce and stimulate the use of that product, but that by 1913 the franchises or rights to sell in certain territories had become very valuable and that he con-

sidered a first line contract or state right had a value of $5 for each gallon of syrup consumed in the territory per year, and the sub-contract, such as the one involved here, a value of $2 for each gallon of syrup consumed in the territory per year. The average consumption of syrup in the Sumter plant territory during the years 1911, 1912 and 1913 was 11,811 gallons, and he considered the franchise right to that territory worth $25,622 when it was acquired by the petitioner in 1913."

It will be noticed from this language that the Board recognized that in determining the value of a franchise for bottling and selling Coca-Cola, that value could properly be based upon the demand for the product and the royalty unit which might have been procured for the granting of a right to manufacture and sell under that franchise.

In the case of *Mossberg Pressed Steel Corporation,* 9 B. T. A. 1161, the Board determined the value of a patent from testimony which it described as follows:

"Relative to the patent assigned by Mossberg to the petitioner on September 24, 1919, we have found that with the exception of one carrier the carrier produced under the Mossberg patent was in several respects superior to the old style carriers then being manufactured. While no carriers had been manufactured under the patent there was at the time the petitioner acquired it an established market for braider carriers. There were at least five million then in use and a portion of them had to be replaced either with the old style carrier or with the Mossberg carrier, which was a superior article. A witness for the petitioner, who is an employee of the New

> England Butt Co. and who was familiar with the various types of carriers manufactured and sold in 1919, expressed his opinion as to an actual cash value of $40,000 on September 24, 1919, of the patent. Mossberg, who had had long experience in obtaining and disposing of patents, testified as to a value of $50,000. In view of all the evidence of the case we are of the opinion that the patent had an actual cash value of at least $40,000 at the time it was assigned to the corporation."

It will be noted from this opinion that the Board considered the type of the invention which was being patented, the demand, or the estimated, anticipated demand for the patented product, and the opinion of the value of the patent as expressed by an expert witness who was familiar with the other factors.

In the case of *Dowagiac Manufacturing Co. v. Minnesota Moline Plow Co.,* 235 U. S. 641, 648, the United States Supreme Court permitted the use of an estimated royalty basis as expressed by the opinion of expert witnesses as a basis for determining the value of a patent, and commented upon the subject in the following terms:

> "So, had the plaintiff pursued a course of granting licenses to others to deal in articles embodying the invention, the established royalty could have been proved as indicative of the value of what was taken, and therefore as affording a basis for measuring the damages. Philip v. Nock, 17 Wall. 460, 462, 21 L. Ed. 679; Bridsall v. Coolidge, 93 U. S. 64, 70, 23 L. Ed. 802, 805; Clark v. Wooster, 119 U. S. 322, 326, 30 L. Ed. 392, 395, 7 Sup. Ct. Rep. 217; Tilghman v. Proctor, 125 U. S. 136, 143, 31 L. Ed. 664, 666, 8 Sup. Ct. Rep. 894. But, as the patent had been

> kept a close monopoly, there was no established royalty. In that situation it was permissible to show the value by proving what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved. Not improbably such proof was more difficult to produce, but it was quite as admissible as that of an established royalty."

In the case of *Ball-Bearing Roller Co.,* 15 B. T. A. 62, the Board, in placing a value upon an application for letters patent, accepted the testimony of an expert witness after being advised of the prospective demand for the invention and of the practicability of the use of the invented article.

In the case of *Sanitary Co. of America v. Commissioner,* 34 Fed. (2d) 439, the Circuit Court of Appeals pointed out the testimony of the witness whose opinion was accepted as establishing the value of the patent, to the effect that a certain invention, upon which patent was secured, could be made at a cost of $.55 to $.58 and sold at $1.05 to indicate the profit that could be derived by the manufacture of the patented article.

In the *Stephens-Adamson Manufacturing Co.* case, *supra,* the Board in valuing a patent application permitted the introduction of evidence of the practicability of the invention, and considered that evidence as a basis for determining value. In its opinion in the case, the Board decides,

> "We have found the value of the invention and application to have been $500,000 on the date of its acquisition by the petitioner. . . . In Individual Towel & Cabinet Service Co., 5 B. T. A. 158, we held

> that the petitioner therein was entitled to an annual deduction for exhaustion of his patent, computed upon the basis of the March 1, 1913 value of the invention and application for patent thereon and a 17-year life of such patent, starting with the actual date of the existence of such patent."

In the case of *Keystone Steel & Wire Company, supra,* the Board also discussed the merits of the invention and the possibilities of the demand for the invented article for which application for patent was pending, and determined that the invention and application had a fair market value on March 1, 1913, of $200,000.00 The only evidence in support of the value of the patent application in that case was the testimony of the petitioner's president, patent attorney, who assisted in securing the patent, and of two individuals connected with other companies engaged in manufacturing wire fence.

Testimony of Witnesses Can Not Be Ignored.

In the instant proceeding the witnesses called upon to testify as to the value of the Briterlite invention gave well qualified and supported opinions of that value. It is the only evidence in the record. The respondent introduced no evidence to rebut their testimony. The general rule, as stated by the Board in the case of *Anita M. Baldwin,* 10 B. T. A. 1198, is applicable and should have been applied by the Board to this proceeding:

> "If the evidence adduced by one party in support of a proposed valuation is clear, convincing and uncontradicted and no reason for disbelieving or discounting such evidence is present, and if the adverse

party neither weakens the testimony by cross-examination nor produces any evidence on his own behalf, the party producing the evidence should prevail."

In the case of *John Douglas Co. v. Commissioner,* 23 B. T. A. 1308, the only question involved was the March 1, 1913 value of patent applications filed in 1910 upon which patents were not granted until 1915. The petitioner introduced two witnesses who testified concerning the practicability of the machine covered by the application for patent, the general demands of the industry at the time, the unique character of the invention, the peculiar need of the industry for such a machine, and the amount of royalties obtainable through licensing the use of the invention. The witnesses testified that the value of the inventions and applications for patent thereon on March 1, 1913, was from $1,750,000 to $2,000,000. The Board after quoting the above stated rule, concluded that the evidence established a value of $1,750,000 on March 1, 1913.

The March 1, 1913, Value of the Briterlite Invention as Established by the Evidence Was at Least $100,000.00.

The Board of Tax Appeals found as a fact that in 1920 the demand for the Briterlite type of indirect lighting fixture was not as great as in 1913. [R. 18.] This fact was testified to by the witness George J. McKenzie [R. 54] and the witness Frank N. Cooley [R. 86], and mentioned by the witness Max Gordon [R. 64]. The witness McKenzie also testified that the *value* of the Briterlite invention was greater on March

1, 1913, than in 1920. [R. 57.] There is the indisputed fact that in 1920, Wagner and Schweitzer sold their Briterlite invention and patent for $85,000.00. On these facts alone, which were found to be facts by the Board, it was established that the Briterlite invention had a value on March 1, 1913, of at least $85,000.00. In addition there was other competent evidence establishing value.

The witness Ernest J. Schweitzer, who with Wagner was co-inventor of the Briterlite fixture, testified that the invention had a March 1, 1913 value of $100,000.00, as follows:

> "Q. What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention and the exclusive right to manufacture and sell that lighting fixture known as 'Briterlite'?
>
> The Member: If; you know, or rather, if you can answer that question. Do you understand the question?
>
> The Witness: Yes, sir.
>
> The Member: Can you answer it?
>
> The Witness: I put my value on it at that time; is that what you want, Judge?
>
> The Member: No, that is not the question; just read the question again.
>
> (The pending question was thereupon again read by the reporter.)
>
> The Member: Now, you see, that asked about what the market value was of the property described in the question. Now, the first question I am going to ask you this, is whether or not you know what the market value of this invention was,—these rights set forth in the question,—we are not talking about what

you think it was worth,—the question is what the market value was, now, do you know?

The Witness: Well, I could not answer that that way, Judge, because we put a price on the Briterlite at one hundred thousand dollars.

The Member: Then, that is just your own value?

The Witness: Mr. Wagner and I.

The Member: Now, that is your own value; that is not the question, then, of what the market value was, is it?

The Witness: Well, we never put it on the market for sale.

The Member: So you do not know what the market value of those patents was, is that true—those inventions?

The Witness: It might have been the same as the Brascolite; the Brascolite made three million dollars and perhaps more.

The Member: Just answer my question: *You say this value of one hundred thousand dollars is the value that you and your associate Mr. Wagner fixed?*

The Witness: Yes, sir.

The Member: *That is what you thought it was worth?*

The Witness: Yes, sir.

The Member: But you did not know,—you did not take into consideration in fixing that value as to what the market value of the invention and the rights were, is that right?

The Witness: We did not have it up for sale, no.

The Member: So this figure of one hundred thousand dollars is your own estimate and that of Mr. Wagner?

The Witness: Yes, sir.

The Member: Of what this invention and these rights were worth, as of March 1, 1913, is that right?

The Witness: Yes, sir." [R. 84, 49, 50.]

In summary, Mr. Schweitzer testified that in 1912 and 1913 Mr. Wagner and himself, as inventors of the Briterlite fixture, placed a value on their invention *at that time* of $100,000.00. This testimony is very valuable and of great weight, since it shows that on or about March 1, 1913, the inventors appreciated the value of their invention and actually placed upon it an estimate of its value at that time, namely, $100,000.00. It reflects a value of the invention placed upon it before there could be any question that future developments might have influenced an opinion of its value. [R. 49.]

The witness Max Gordon testified, first, that though he or his company never sold the Briterlite fixtures, they would like to have sold them, since he knew that at that date there was considerable demand for that fixture. [R. 59, 60.] When asked whether he could express an opinion as to the value as of March 1, 1913, of the Briterlite invention, he answered in the affirmative and, upon further question, stated: "If I were to estimate the value of that patent, if I could have had it at that time, I would have been willing to pay about $75,000 to $100,000 for it, because I know the demand was great." [R. 63.] As the basis for this valuation, he testified that it was his opinion that there could be sold at that time 10,000 fixtures a year, that he would have been willing to pay $1.00 per unit as a royalty for the exclusive right to sell

the invented article, "even for California," and that he would estimate a ten-year economic life of the invented or patented article; that with these factors he could express a value of from $75,000 to $100,000 for the invention as of March 1, 1913. It is important to note that Mr. Gordon's value is based solely on the value of the invention for use and distribution on the Pacific Coast alone. He confined his expression of value to this limit, because he had no personal knowledge of the extent of the distribution which might be made of the product in sections of the country other than the Pacific Coast. [R. 57 to 65.]

The witness Jerome Fugate testified that he could express an opinion of the value of the Briterlite invention on March 1, 1913. [R. 70.] His answer giving this value was stated in the following words:

> "The Witness: Well, I would first, of course, have to base the value of such a right to manufacture on what the supply and demand for the production in question would be. The only thing I would have to base such an estimated value upon would be, naturally, upon my knowledge of the distribution possibilities, based on past experience of a similar type fixture in the United States, in general, distribution possibilities, in other words. I would say that in my experience with the Capitol Electric Company of Salt Lake City, where we operated this chain of twenty-one stores, that I made reference to using that as a basis; the average sales of those institutions ran very close to ten thousand a month; they were not large institutions—about half of their sales were based upon commercial fixtures,—store lighting fixtures,—office building fixtures, and so on. This

Brascolite had absolutely been the only unit that could be sold in this territory, coming into Los Angeles, I found the Briterlite invention here in use and it offered a highly competitive fixture which could readily be sold in competition with the Brascolite, and it would have been little or no problem whatever for any manufacturer to have easily reached a distribution of one hundred thousand units per year in the United States. I would base that upon the average of sales for an average store,—an average institution running around one thousand units per year; it would not be very difficult to obtain one hundred of such distributing points in this country; I would say a very fair market value for the privilege of manufacturing such a fixture would have been, at a minimum, one hundred thousand dollars." [R. 71, 72.]

Upon cross-examination, he was asked:

"Q. Now, keeping out of your mind, Mr. Fugate, the information and knowledge you have at the present time with regard to this development of this Briterlite and Brascolite and putting—placing yourself back, figuratively speaking, to on or about March 1, 1913, do I understand you to testify that you would have on that date,—you would have been willing on that date to have paid $100,000 for the Briterlite invention?"

To this question, Mr. Fugate answered, "I did." [R. 75.]

The witness Frank N. Cooley testified that the March 1, 1913 value of the invention was $300,000.00. [R. 85.] When asked to give the basis for his opinion he answered as follows:

"A. I would base that on an estimate of possibly five thousand units in this territory, which would be approximately fifteen thousand units for the Coast, which, under our system of estimating the entire country is ten per cent of the entire country's demand for that class of stuff, and that would give about 150,000 units. *From experience that I have had in attempting to market an invention,* I find that the prevailing royalty basis is approximately five per cent of the manufacturing cost; the manufacturing cost of one of those units, I would say, the average cost, would be about ten dollars, which would be about fifty cents a unit, at fifty cents a unit, a million and a half units would figure around $750,000. In my estimation, due to the fact that you have ten years of practical life of the patent,—the other seven you might be getting started and competition may come up, but by discounting that fifty per cent it still brings it down to $375,000; that is how I roughly estimate the market value of the invention. By the Member:

Q. As of March 1, 1913?

A. *Yes, because that was the time when it was very valuable; it is not now, because of all of the competition.*" [R. 85, 86, 87.]

That Mr. Cooley's opinion of the value of the Briterlite invention is not inconsistent with the value expressed by the other witnesses, even though triple in amount, may readily be appreciated from the fact that Mr. Cooley's experience familiarized him with a market which was much more extensive than the market within the knowledge of the other witnesses. Mr. Fugate was familiar with market conditions as he became acquainted with them through an organization whose distribution

comprised four states. Mr. Gordon's familiarity of merket conditions was limited to the Pacific Coast as the market with which he was acquainted. Mr. Cooley, however, was acquainted with an extensive organization, distributing lighting fixtures over the entire United States through more than 60 distribution houses. It is, therefore, obvious that Mr. Cooley could appreciate much greater possibilities of an invention, such as the Briterlite invention, because of his familiarity of a much larger distribution or market.

This comprises the entire record of the testimony as to value. Nowhere is there the slightest intimation that the invention had no value on March 1, 1913. True, such a conclusion is established at the commencement of the trial by the presumption in favor of the Commissioner's determination. But such presumption is rebuttable and when reasonably convincing evidence is introduced to prove the contrary, the burden shifts upon the Commissioner to introduce evidence to support his determination. *Royal Packing Co. v. Commissioner,* 22 Fed. (2d) 536. Since the evidence introduced by the petitioner not only proved that the Commissioner erred in his determination that the invention had no value on March 1, 1913, but also proved that such value was actually not less than $100,000.00, and since the Commissioner introduced absolutely no evidence to impeach or contradict the petitioner's witnesses, the Board erred in ignoring the evidence and sustaining the Commissioner.

The Witnesses Were Qualified to Express an Opinion of Value and the Board Was Required to Find a Value From the Evidence.

It is extraordinary that it was possible to discover and introduce before the trial Board such a group of witnesses as well qualified and competent to express an opinion of value of an item of property as unique as the one involved in this proceeding, as were introduced to the Board of Tax Appeals in the hearing on this case. The Board committed serious error in refusing to give any weight or credence whatever to the testimony of these witnesses. The Circuit Court of Appeals has been ready to correct such errors by reversing the decisions of the Board in such cases. That the witnesses were well qualified and competent to testify as to the matters they were called upon to testify can hardly be doubted.

The witness Frederick S. Lyon is one of the most prominent patent attorneys in the West. He has engaged exclusively in the patent law business for the past 38 years. He testified that in 1912 at the request of Wagner and Schweitzer he investigated the patentability of the Briterlite invention but that he "did not immediately file an application for a patent for the reason that the law allows an invention to be in use anywhere less than two years without barring the right to a patent." He testified that the only question was whether the Briterlite infringed the Brascolite or Guth patent and as to this he advised Wagner and Schweitzer that there was no infringement. He also testified that the Briterlite invention was particularly valuable since it was the only non-infringing competitive light which,

because of intervening rights, was not excluded from right to patent by a subsequent reissue or amendment of the Guth or Brascolite patent. He also testified as to the installations of and demand for the indirect lighting fixture. [R. 28, 29, 30 to 34; also R. 16.]

The witness Ernest J. Schweitzer, who with Mr. Robert G. Wagner was the co-inventor of the Briterlite fixture, testified that he was then engaged in the business of manufacturing lighting fixtures, had been engaged in that business for the past 18 years and had been employed by others in the fixture business even prior thereto. He testified that he, with Mr. Wagner, invented the Briterlite fixture in 1912, and began manufacturing and selling that fixture the same year. He explained the demand for such a type fixture in 1912 and 1913, the reasons for such a demand, and the only other type of fixture with which Briterlite would have to compete. He also testified as to the cost of the manufacture of the Briterlite fixture, and the price for which it could be sold and the profit which might be expected to be realized from the sale of that fixture. He and Robert J. Wagner sold the Briterlite invention in 1920 for $85,000. He was qualified to express his opinion of the value of his invention on March 1, 1913, not only as an expert but also as an owner who might be called upon to value his own property. [R. 34 to 51.]

The witness George J. McKenzie testified that he was the manager of the Wagner-Woodruff Corporation, a company which was engaged and had been engaged in the business of manufacturing lighting fixtures. He testified that he was with that corporation for the past

19 years, and that that corporation began selling the Briterlite fixture in 1912. He describes very minutely the Briterlite fixture, explaining its superiority over the other types of fixtures then in vogue. He explained the market and demand for such a fixture in 1912 and 1913, and the reasons for such market conditions. He explained the method used in 1912 and 1913 for determining the sales price for the Briterlite fixtures being manufactured. He expressed his familiarity with the market for such fixture in 1920 as compared with 1913. He was undoubtedly qualified to express his opinion as to the comparative values of the Briterlite invention in 1920 and on March 1, 1913. [R. 51 to 57.]

The witness Max L. Gordon testified that he had been in the lighting fixture business practically all his life; that from the years 1909 to 1912 he was one of the owners of the California Fixture Company, and from 1912 to 1925 was one of the owners of the National Fixture Company; that prior to 1909 he was employed as foreman for the Mission Fixture Company; that he was familiar with all types of lighting fixtures in use in the years 1912 and 1913. He explained the demand prevelant in 1913 and 1914 for indirect lighting fixtures. He testified as to his familiarity with the types of indirect lighting fixtures existing at that time. He testified that he was familiar with the cost of manufacturing lighting fixtures; that he was familiar with the sales prices of the Briterlite fixtures. He was also familiar with the general method of the trade in determining these sales prices of lighting fixtures, and the rate of profit which was realized upon the sale of fix-

tures. He testified that he knew the Briterlite fixture, and was familiar with the existing market or demand for that type of fixture on March 1, 1913. He also explained the superiority of the Briterlite fixture over the other types. Mr. Gordon, as a man who had devoted his entire life to the lighting fixture business, manufacturing and selling fixtures of his own production and also the product of other fixture companies, was sufficiently experienced to be qualified to express an opinion of the value of the Briterlite invention on March 1, 1913. [R. 57 to 65.]

The witness Jerome Fugate testified that he was a partner in the Wagner-Woodruff Company and had been so employed for three years; that for several years prior to that time he was engaged in the business of selling lighting fixtures in Los Angeles and vicinity, and prior to that time he was engaged for himself in the business of designing and manufacturing lighting fixtures in Tacoma, Washington, and prior to engaging in that business he had been employed as manager of the Mullins Electric Supply Co. of Tacoma, Washington. In 1912 and 1913, he was engaged as salesman in the sale of the lighting fixtures for the W. G. Hudson Co. of Los Angeles, and for the years 1909 to 1912, he was employed as traveling auditor for the Capital Electric Company of Salt Lake City, which corporation was engaged in the business of designing, manufacturing and distributing lighting fixtures and supplies. Their distribution consisted in the operation of a chain of 21 retail establishments throughout the states of Utah, Idaho, Montana and Eastern Oregon. Mr. Fugate

testified that he was familiar with the Briterlite fixture in 1913; that it could easily be sold in competition with the Brascolite because of the superior features which it had from a selling standpoint; that he was familiar with the demand for lighting fixtures at that period; explained the reasons for such demand or market; that he could give an opinion as to the value of the Briterlite fixture; and, in answer to counsel's question, showed that he was familiar with the definition of the term, "fair market value." The extent of the experience of this witness, enabling him to become familiar with the demand for lighting fixtures, the prices for which they were being sold, the quality and quantity of the competition to be met by various types of fixtures, the market conditions and the impressions of the trade regarding lighting fixtures, and the opportunity for profit, manufacture and sale of certain types of lighting fixtures, qualify Mr. Fugate as a witness who can express an opinion as to the fair market value of an invention of a new type of lighting fixture with which he was also familiar. [R. 66 to 77.]

The witness Frank N. Cooley testified that he was employed as a lighting specialist for the Graybar Electric Company of Los Angeles; that he had been employed in that position for the past 18 years; that he was so employed in the years 1912 and 1913, although at that time the name of the Graybar Electric Company was the Western Electric Company; that the Western Electric Company was engaged in the lighting fixture business, with an extensive distribution organization in the United States consisting in 1912 and 1913 of

approximately 62 houses and at the present time of 76 houses doing approximately $90,000,000 to $100,000,000 a year business. He testified that he had been engaged in the lighting fixture business for the past 30 years. He testified that he was familiar with the lighting systems and lighting fixtures in 1912 and 1913 and with the demand for indirect lighting fixtures during those same years. He explained the reasons for the market conditions in 1912 and 1913. He was familiar with the prevailing rates or royalties at which manufacturing under patent rights were secured in 1912 and 1913. He testified that, although in 1912 and 1913 he was not personally familiar with the Briterlite fixture, he became familiar with that light in the last five or six years, during which time he has had opportunity to examine it and see it in operation. He testified, in response to questions by the Member of the Board, that, although he did not know the comparative qualities of Briterlite with other lighting fixtures in 1912 and 1913, he was satisfied from information which he secured in the last five years that the Briterlite was a better design than the Brascolite and other lights that he had come in contact with at that time. There can be no question but what Mr. Cooley's qualifications were sufficient to entitle him to testify as an expert as to the fair market value of the Briterlite invention on March 1, 1913, and his qualifications were not impaired in any way by the fact that certain data, upon which his value was based, were not within his personal knowledge on March 1, 1913, since by hypothetical question, which was asked him, those factors were given to him as factors which he might consider in his de-

termination of the market value of that invention. [R. 78 to 87.]

In an extreme case, with a state of facts much more unfavorable than those existing in this proceeding, the case of *Joseph H. Adams* (*supra*), 23 B. T. A. 71, where patent applications were in a state of rejection in the Government Patent Office on March 1, 1913, the Board, in a lengthy opinion supporting its finding of a March 1, 1913 value for such applications, made the following statements:

> ". . . rejections such as had here occurred are not to be considered final and a skilled patent attorney might well have been able to have foreseen the ultimate outcome with a reasonable degree of certainty. . . ." (23 B. T. A. p. 102.)

> "The most we can say is that we are satisfied that a willing purchaser, skilled in the art with which we are concerned and fully cognizant of all conditions as they existed and were reasonably contemplated at that time, would have recognized a fair market value attaching to the applications at March 1, 1913." (23 B. T. A. p. 114.)

> "Further, it might be said that, since we have no yardstick by which to measure our value in this case, whatever value we determine in excess of zero and less than $25,000,000 may be said to contain an element of speculation, but as Judge Learned Hand said in *Cohan v. Commissioner of Internal Revenue,* 39 Fed. (2d) 540, 'It is not fatal that the result will inevitably be speculative; many important decisions must be such.' But looking at the situation as it existed on March 1, 1913, and considering all factors, both favorable and unfavorable, as well as certain and uncertain, we have reached the conclusion that the two patent applications in question had a fair market value on March 1, 1913, of $750,000." (23 B. T. A. p. 115.)

In this case the Board considered such factors of which we have evidence in the instant proceeding, that is, demand for product, superiority of product, royalty rate, etc. The Board has in other cases, some of which have already been mentioned herein, followed the rule that it must give consideration to evidence such as this and must determine a value proved thereby. Where the Board has failed to follow this rule the U. S. Circuit Courts of Appeal have been quick to correct the Board's errors:

Royal Packing Co. v. Commissioner, 22 Fed. (2d) 536-9;

Buena Vista Land &Develop. Co. v. Lucas, 41 Fed. (2d) 131-9;

Citrus Soap Co. v. Lucas, 42 Fed. (2d) 372-9;

Commissioner v. Swenson, 56 Fed. (2d) 544;

Chicago Ry. Equipment Co. v. Blair, 20 Fed. (2d) 10;

Bonwit Teller & Co. v. Com., 53 Fed. (2d) 381;

Boggs & Buhl v. Commissioner, 34 Fed. (2d) 859;

Pfleghar Hardware Specialty Co. v. Blair, 30 Fed. (2d) 614;

Am-Plus Storage Battery Co. v. Commissioner, 35 Fed. (2d) 167;

Kendrick Coal & Dock Co. v. Com., 29 Fed. (2d) 559;

Heiner v. Crosby, 24 Fed. (2d) 191;

Anchor Co. v. Commissioner, 42 Fed. (2d) 99;

Pittsburgh Hotels Co. v. Com., 43 Fed. (2d) 345, 347;

Nichols v. Commissioner, 44 Fed. (2d) 157, 159;

Rice v. Commissioner, 47 Fed. (2d) 99;

Tracy v. Commissioner, 53 Fed. (2d) 575.

Even the fact that an element of speculation may enter into the determination of value has not deterred the Circuit Court of Appeals from requiring the Board to determine a value from the evidence where the evidence is reasonably convincing that a value exists. In the case of *Commissioner v. Swenson,* 56 Fed. (2d) 533, the Circuit Court of Appeals for the Fifth Circuit stated:

> "The value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money it would bring in the market. That value depends largely on expectations as to what may be realized from the property in the future. (Ithaca Trust Co. v. United States, 279 U. S. 151 (Ct. D. 61, C. B. VIII-1, 313).) The fact that those expectations are highly speculative may not keep them from being influential in bringing about a willingness to expend money for the acquisition of the property or an interest in it. Though a venture is as speculative as a lottery, a chance or interest in it may be readily salable for a substantial sum of money. The law does not forbid the recognition of the proved exchangeable value of an asset because of the speculative nature of it. (Collin v. Commissioner of Internal Revenue, 32 Fed. (2d), 753.) Furthermore, it did not appear from the evidence that it was mere guesswork to attribute a substantial money value to the shares of stock in question at the time they were received in exchange for an oil and gas lease. * * * The Board's conclusion that those shares, at the time they were received in exchange for an oil and gas lease, had no fair market value involved a disregard of evidence having a substantial tendency to prove that at that time they had a fair market value."

The Honorable Circuit Court of Appeals for the Ninth Circuit Has Consistently Required the Board to Give Due Regard to the Evidence Introduced at the Trial of a Proceeding.

This Honorable Circuit Court has not hesitated to require strict compliance with this general rule that unimpeached or uncontradicted eidence cannot be disregarded. In the case of *Royal Packing Co. v. Commissioner,* 22 Fed. (2d) 536, the court, in reversing the Board's decision, 5 B. T. A. 55, stated:

> "Giving to terms their proper legal significance, vital parts of the Board's decision seem to be irreconcilably inconsistent with each other. It is said that 'the Universal Packing Company began operations in 1917 and from the beginning was a failure financially'; and that 'the evidence is clear that the Universal Packing Company became insolvent and ceased to function prior to November 1, 1918, a date within the taxable year.' And yet it is further stated that 'there is no convincing evidence that any loss was sustained in that taxable year.' But how could the stock, and particularly the common stock, of such a corporation, out of business and wholly insolvent, be of any value? And adding to the confusion is the fact that, as we view it, the evidence fails to warrant either of the first two statements. The record may suggest the possibility but it is so meager, disconnected, and altogether inadequate, as to leave the ultimate facts largely to conjecture and speculation. Moreover, if it was intended to hold that 'there was no convincing evidence that any loss was sustained in the taxable year' because, as stated, the sale of the assets of the corporation and the 'final liquidation of its business were not com-

pleted within the fiscal year,' the reasoning is deemed to be invalid.

Upon a review in this class of cases, we are given the 'power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.' Section 1003(b), Revenue Act 1926, pt. 2, 44 Stat. 110 (26 U. S. C. A. Sec. 1226). Questions of fact are exclusively for the Board, except that we may consider whether its findings are supported by any substantial evidence. Senate Committee Report 52, Sixty-ninth Congress, First Session, p. 36.

We are of the opinion that justice requires a reversal of the decision, and that the case be remanded for hearing; and such will be the order, without costs." (Italics ours.)

In the instant case every finding of fact by the Board would, to a reasonable person, indicate that the Briterlite invention had a value on March 1, 1913. There is no specific finding of fact that it had no value, but in the opinion the Board concludes that the evidence does not prove a value. Reference to the source from which the Board made its findings of facts could leave no doubt but that the value was established.

In another case decided by this Honorable Circuit Court, *Buena Vista Land & Development Co. v. Lucas,* 41 Fed. (2d) 131, the court, in reversing the Board's decision, 13 B. T. A. 895, stated:

"It was proved that the land involved in the transaction was worth about $25,000,000 on March 1, 1913, and was worth as much or more at the time of the settlement. The question with which the

Board of Tax Appeals concerned itself was the relative market value of the property at the time of its sale, or surrender, and its value on March 1, 1913. The Board announced that it would fix the tax upon the difference between the two.

It was thus the duty of the Board of Tax Appeals to ascertain the value of the property disposed of June 28, 1921, as of the date of March 1, 1913 (section 907(b), 44 Stat., Chap. 27, pp. 9, 107), and fix the same in its findings. This the Board failed to do and for this error its decision must be reversed. Kendrick Coal & Dock Co. v. Commissioner of Internal Rev. (C. C. A.) 29 F. (2d) 559; Pfleghar Hdw. Specialty Co. v. Blair (C. C. A. 2) 30 F. (2d) 614; Chicago Ry. Equip. Co. v. Blair (C. C. A. 7), 20 F. (2d) 10. * * *"

"When the taxpayer established the fact that its rights were the same on both dates and the value of the land the same, it has made a prima facie showing that there was no increase in value, and hence no taxable income." (Italics ours.)

The synopsis shows that the court concluded—"Taxpayer having established that its rights in and value of land were the same on March 1, 1913, and on date of disposal, made *prima facie* showing of no increase in value." In this case the only witness who testified in behalf of the petitioner was one of its officers and stockholders. He apparently confined his testimony to the fact and conclusion that the property was equally valuable on March 1, 1913, as in 1921.

In the instant case, the evidence not only shows that circumstances on March 1, 1913, were such as to warrant the conclusion that the Briterlite invention was more

valuable on March 1, 1913, than in 1920, but there is direct and unequivocal testimony supporting that fact. [R. 18, 54, 57, 64, 86.] Under authority of the *Buena Vista Land* case above cited, the disregard of this testimony alone would be sufficient to constitute reversible error.

In the case of *Citrus Soap Co. v. Commissioner,* 42 Fed. (2d) 372, this Honorable Circuit Court again reversed the Board for failure to give proper consideration to the evidence. In that case a witness who was a director, secretary and treasurer of a predecessor corporation testified that the good will acquired by the petitioner from the predecessor company had a value of approximately $500,000.00. The Board, however, disregarded this evidence and ruled that the good will had no value. This court, in reversing the Board, and in referring to the testimony of the witness above mentioned, stated:

> "The foregoing testimony was competent and from a competent source. It was not contradicted by any other testimony. It was not unreasonable or improbable in itself, and, in our opinion, it tended to prove as a matter of law that the good will acquired by the petitioner from its predecessor in interest had a substantial value. What that value was, or the mode or formula by which it should be ascertained, is primarily for the determination of the Board of Tax Appeals."

As to the other issue involved in the case this court also reversed the Board, stating:

> "In reference to the loss sustained through the demolition of the building the Board said:

'For the reasons heretofore stated, we are unable to determine the cost to the petitioner of the old factory building, and we cannot, therefore, disturb the respondent's determination as to the amount of the loss sustained in 1920 on the sale thereof.'

The testimony on this issue was unsatisfactory, but such testimony as was given was not contradicted. The witness already quoted testified that the building had a value of $10,000 at the time of its acquisition by the petitioner, and the amount realized upon its demolition was far below that sum. *And, without further discussing the latter question, we think the ends of justice will be best subserved by referring the case back to the board* for a rehearing to determine both issues anew. It is so ordered." (Italics ours.)

OTHER DECISIONS.

The synopsis of the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Chicago Ry. Equipment Co. v. Blair* as reported in 20 Fed. (2d) 10, shows the ruling of the court reversing the Board (4 B. T. A. 452) upon issues similar to those here involved, to be:

"4. Board of Tax Appeals, created by Revenue Act 1924, Tit. 9, Sec. 900 (Comp. St. Sec. 6371 5/6b), must make a thorough and careful examination of all facts, so as to reach just conclusion between taxpayer and government, *and is not authorized to impose hard or unusual rules, that would exclude evidence competent and material under usual and ordinary rules of evidence,* nor that would afford Board the widest range of discretion."

"7. Board of Tax Appeals, on appeal from Commissioner's assessment of additional tax *held* to have

erroneously rejected evidence before it of market value as of March 1, 1913, for purpose of making depreciation allowance, in view of evidence establishing success of operation of taxpayer's business in 1913; it not being necessary that property be for sale before it can have a market value, nor that there shall be known buyer for it." (Italics ours.)

In the case of *Bonwit Teller & Co. v. Commissioner,* 53 Fed. (2d) 381, the Circuit Court of Appeals for the Second Circuit, in reversing the Board (17 B. T. A. 1019), stated:

"The Board's finding of valuation is challenged as an arbitrary figure unsupported by the evidence. The taxpayer alone submitted evidence. Its valuation witness was well qualified as an expert and was thoroughly cross-examined. He expressed the opinion that the lease had a value of $982,952 on March 1, 1913, and then explained in detail how he arrived at this figure." * * *.

"In Pittsburgh Hotels Co. v. Commissioner, 43 F. (2d) 345 (C. C. A. 3) the court held that a finding of 2 per cent. depreciation in certain property, in the face of testimony by six experts that 4 per cent. was a fair figure, could not stand when there was nothing in the record to indicate that the Board's estimate was based on facts in the record or on the Board's personal knowledge or experience. Similarly the Board's estimate of the value of good will was upset where several business men had testified to a higher figure and there was no contrary evidence. Boggs & Buhl v. Commissioner, 34 F. (2d) 859 (C. C. A. 3). The court said, at page 861: ' * * * While the Board may, as a general principle, reject expert testimony and reach a conclusion in accordance with

its own knowledge, experience, and judgment, yet it must have knowledge of and experience with the particular subject under consideration. There is no evidence that the Board had any independent and personal knowledge whatever of the business, reputation, and good will of the petitioner. Therefore it could not set aside or disregard all the positive and affirmative evidence as to the value of the good will, and base its conclusion upon conjecture. Midland Valley R. R. Co. v. Fulgham (C. C. A.) 181 F. 91, 95; DeFord v. Commissioner (C. C. A.) 29 F. (2d) 532. Consequently it should not have disregarded the only positive and direct evidence as to the value of the good will of the petitioner. Its order will accordingly be modified, and good will allowed to the extent of $975,000.'

On similar grounds a finding was set aside in Nichols v. Commissioner, 44 F. (2d) 157 (C. C. A. 3). *In Dempster Mill Mfg. Co. v. Burnet* (App. D. C.) 46 F. (2d) 604, *there was only one expert witness, and it was held error to disregard his testimony.* There the evidence was thought too inconclusive for the court to direct a finding, and the case was remanded. This we believe to be the proper course to pursue in the present case." (Italics ours.)

These quotations indicate the attitude of the courts to a disregard by the Board of Tax Appeals of competent evidence.

In this proceeding it must be obvious that the Board's findings of facts infer that on March 1, 1913, the Briterlite invention was a valuable invention. The Board was then charged with the duty of determining from the Record the extent of that value. This the Board failed to do and by such failure the Board has disregarded all the evidence and has committed serious error to the detriment of the petitioner.

Argument in Support of Contentions That Board Erred in Sustaining Objections to Evidence as Set Forth in Amended Assignments of Error as Alleged Errors IV to IX, Inclusive.

In the amended assignments of error, which were filed to conform with Rules 11 and 28 of this court, there is set out in full under errors IV to IX, inclusive, the evidence rejected by the Board by its rulings upon objections by counsel for respondent. In setting out these assignments of error it was necessary to include arguments of counsel for the respective parties, so that there appears therein the position of the parties concerning the admissibility of this evidence. Due to the fact that the Board did not indicate its rulings on the evidence until after the statement of evidence was filed in this proceeding, the statement of evidence appearing in the printed transcript of record [pp. 27 to 88] contains in full the same evidence set out in the amended assignments of error. We will not, therefore, repeat those arguments herein, but will devote this section of this brief to support of those contentions.

It is a general rule that the opinion evidence of experts may be used where the thing to which it relates is such that one without particular training or knowledge or experience in connection with that thing will have difficulty in drawing a proper inference from the facts. (*King v. Davis,* 54 App. D. C. 239.)

It is a peculiarity of this kind of testimony that the witness may, but need not, testify from facts within his personal knowledge. An expert witness may testify from facts he knows, from facts which have been stated

to him or given in evidence by others, or from both. The use of hypothetical questions illustrates cases in which the expert testifies from facts derived from others. A hypothetical question must fairly state the evidence or such part thereof as it purports to embrace. (*Horton v. U. S.,* 15 App. D. C. 310; *Snell v. U. S.,* 16 App. D. C. 501; *Guenther v. Metro. R. R. Co.,* 23 App. D. C. 493; *Turner v. A. S. & T. Co.,* 29 App. D. C. 460; *W. A. & Mt. V. R. Co. v. Lukens,* 32 App. D. C. 442; *Magaw v. Huntley,* 36 App. D. C. 26; *Carson v. Jackson,* 52 App. D. C. 51.)

Without doubt, the value of an invention of an indirect lighting fixture is something which cannot be within the knowledge of an ordinary individual. This is a matter concerning which only a person with particular training or knowledge or experience could testify. The only possible source from which such a value could be determined would be the opinions of those who had a superior knowledge of the subject of the valuation, those who by their training and experience would have a knowledge of what such property could have brought in a transaction between a willing buyer and a willing seller.

Every witness introduced in this proceeding was exceptionally well experienced in relation to the business, as it existed on March 1, 1913, of buying, selling and manufacturing of indirect lighting fixtures. Each witness had knowledge of the profits obtainable from that business. Some of the witnesses were acquainted with the prevailing royalty rate for licensing the sale or manufacture of a patented lighting fixture. Each witness was fully familiar with the demand and market on March 1, 1913,

of indirect lighting fixtures. Each witness was competent and qualified to testify to the matters of which they were asked. (See *supra,* pp. 39 to 47.)

In the following discussion we make reference to a number of decisions by the Courts of the District of Columbia. This is done principally for the reason that section 907 of the Revenue Act of 1926 provides:

> "The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia."

Testimony of Ernest J. Schweitzer.

There is assigned as error No. IV that the Board of Tax Appeals erred in sustaining the objections of counsel for respondent to the admission in evidence of the testimony of the witness Ernest J. Schweitzer, co-inventor with Robert G. Wagner of the Briterlite invention, concerning the fair market value on March 1, 1913, of said Briterlite invention, and as error No. V that the Board of Tax Appeals erred in rejecting as evidence the testimony of the witness Ernest J. Schweitzer, concerning his opinion, as owner of the invention, of the fair market value on March 1, 1913, of the Briterlite invention.

Hereinbefore (*supra,* p. 40) we have touched upon the qualifications and competency of this witness to testify as to the March 1, 1913, value of his Briterlite invention. His opinion was solicited as the opinion not only of an expert but also of an owner. A reading of his testimony

seems convincing of his competency as an expert. Not only did he actually have a part in the discovery of the invention but, as was brought out by the Board member by his own interrogation, Mr. Schweitzer and Mr. Wagner were sufficiently informed of the value of their invention *that on March 1, 1913, they placed a value on the invention of $100,000.* Schweitzer was then engaged in the lighting fixture business and must have known the value of his products. His evidence, corroborated as it is by the testimony of other witnesses and the actual sale of the invention, after patent, should not be ignored.

It has frequently been ruled that an owner is presumed to have sufficient knowledge as to the value of his property that he might express an opinion concerning that value.

Barrett v. Fournial, 21 Fed. (2d) 298;
Hartman v. Ruby, 16 App. D. C. 45, 55;
Dobbins v. Thomas, 30 App. D. C. 511.

We submit that the Board erred in rejecting the testimony of this witness as set out in the assignment of error herein referred to as error IV and V.

Testimony of Witness George J. McKenzie.

There is assigned as error VI that the Board of Tax Appeals erred in sustaining the objection of counsel for respondent to the admission in evidence of the testimony of the witness, George J. McKenzie, concerning the comparative values of the Briterlite invention in 1913 and in 1920.

The qualifications and competency of the witness to testify has hereinbefore been discussed (*supra,* p. 40). Undoubtedly this witness had such close contact with the lighting fixture business for the past 20 years that he was qualified to express an opinion as to the comparative value in 1913 and in 1920 of an invention of a superior lighting fixture. There can be absolutely no question as to the familiarity of this witness with the lighting fixtures in extensive use in 1913, and with the fact of superiority of the Briterlite over others. The Board accepted this testimony, as can be inferred from its findings of fact, as to the superiority of the Briterlite [Tr. p. 17]. That this evidence of comparison of values is material can best be answered by the fact that the disregard by the Board of just such evidence in the case of *Buena Vista Land & Development Co. v. Lucas* (*supra,* p. 49) was mentioned by this court as one of the grounds for the reversal of the Board's decision.

We submit that the Board erred in rejecting this testimony as set out in the assignment of error herein referred to as error VI.

Testimony of Witness Max L. Gordon.

There is assigned as error No. VII that the Board of Tax Appeals erred in sustaining the objection of counsel for respondent to the admission in evidence of the testimony of the witness Max L. Gordon, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The qualifications and competency of this witness to testify have hereinbefore been discussed (*supra,* p. 41).

We can conceive of no reason why this witness, who had devoted most of his life to the lighting fixture business, who was operating in 1913 as a competitor of Schweitzer and Wagner, who was personally familiar with the Briterlite as it was being manufactured and sold in 1912 and 1913, can be denied the right to express an opinion of the market value of the Briterlite invention on March 1, 1913.

It is true that he was not engaged in the lighting fixture business at the time of the trial of this proceeding before the Board. But that fact cannot effect his qualifications as an expert. He was engaged in that business on March 1, 1913, and was entirely familiar with conditions of the business as they existed at that time.

A witness may have become qualified by actual experience or long observation without having made a study of the subject. (*Potter v. Grand Trunk R. R. Co.,* 157 Mich. 216; *Greenfield v. People,* 85 N. Y. 75.) On the other hand, he may be an expert, although his knowledge has been derived from the study of the subject and not from actual experience or practice in the business or profession. And if the occupation and experience of the witness have been such as to give him the requisite means of knowledge of the subject, *he may be competent as an expert, although engaged in some other occupation,* or even if he has abandoned the business to which the inquiry relates. (*Wilson v. Bauman,* 80 Ill. 493; *Snyder v. Western Union Ry. Co.,* 25 Wis. 60; *Robertson v. Knapp,* 35 N. Y. 91; *Tullis v. Kidd,* 12 Ala. 648.)

We submit that, because of his actual experience and knowledge, this witness was qualified to express an opinion

of value and that the Board erred in rejecting his testimony as set out in the assignment of error herein referred to as error No. VII.

Testimony of Witnesses Jerome Fugate and Frank N. Cooley.

There is assigned as error No. VIII that the Board of Tax Appeals erred in sustaining the objection of counsel for the respondent to the admission in evidence of the testimony of the witness Jerome Fugate, concerning the fair market value on March 1, 1913, of the Briterlite invention, and there is also assigned as error No. IX that the Board of Tax Appeals erred in sustaining the objection of counsel for the respondent to the admission in evidence of the testimony of the witness Frank N. Cooley, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The qualifications and competency of these witnesses to testify has hereinbefore been discussed (*supra,* pp. 42-43).

We wish to point out that, as to the witness Fugate, not only were his qualifications brought out on direct examination, but they were emphasized and strengthened by cross-examination. [Tr. pp. 72 to 77.] In fact, we feel that the examination of this witness on cross-examination was such as to bind the respondent by the witness' answers that the March 1, 1913, value of the Briterlite invention was at least $100,000.

The assignment of error No. VIII sets out the testimony of this witness Fugate. This testimony also ap-

pears in full on pages 66 to 77, inclusive, of the printed transcript of record filed in this proceeding. The assignment of error No. IX sets out the testimony of the witness Cooley. This testimony also appears in full on pages 78 to 87 of the printed transcript of record.

It appears that counsel for respondent objected to the use of hypothetical questions.

It has been held that it is not necessary that an expert should have seen the property or article in question or have personal knowledge concerning it. (*Stone v. Covell,* 29 Mich. 359; *Slocovich v. Orient Ins. Co.,* 108 N. Y. 56; *Rush v. Wood,* 34 Pa. St. 451.) His knowledge may be gained by having dealt in similar property, although at another place (*Hangen v. Hachemeister,* 114 N. Y. 566; *Seattle R. Co. v. Roeder,* 30 Wash. 244), or from the description of the articles by other witnesses, *and hypothetical questions he may be asked based on such descriptions.* (*Alabama Consol. Coal, etc., Co. v. Turner,* 145 Ala. 639; *Burr's Ferry, etc., Ry. Co. v. Allen* (Tex.), 164 S. W. 878.) *Anyone who has a special and peculiar knowledge of the subject may testify.* (*City of Baltimore v. Yost,* 121 Md. 366; *Bristol Co. Bank v. Keavy,* 128 Mass. 298.)

A witness has been held qualified to testify as to value of land *if he has had an opportunity of forming a correct opinion as to its value.* (*Central Ga. Power Co. v. Cornwell,* 129 Ga. 1.) It is not essential that the witness should have bought or sold land in that vicinity, or that he should have known the actual sales of such tracts as the one in question. The essentials are: *"First, a knowl-*

edge of the intrinsic properties of the thing; secondly, a knowledge of the state of the markets." (*Wharton, Evidence,* sec. 447; *Sharp v. Niagara Fire Ins. Co.,* 164 Mo. App. 475.)

Experts may be called upon to give an opinion on something not within their personal knowledge or on an assumed state of facts. *This assumed state of facts may be placed before the witness by hypothetical questions.* As to the form of the question, it should be so framed as to fairly and clearly present the state of facts which the counsel claims to be proved, and which the testimony on his part tends to prove. (*Denver R. Co. v. Roller* (9th Circ.), 100 Fed. 738; *Davidson v. Laughlin,* 138 Cal. 320.) It is sufficient if the question fairly states such facts as the proof of the examiner fairly tends to establish, *and fairly presents his claim or theory.* (*Denver, etc., R. Co. v. Roller,* 100 Fed. 738 (9th Circ.); *Filer v. New York Ry. Co.,* 49 N. Y. 42.)

The witness Fugate was asked the following question [Tr. p. 69]:

"By Mr. Koster:

Q. Assuming that you had, or that you could purchase at March 1, 1913, or thereabouts, a right, a patent or an invention, together with the exclusive right to manufacture and sell that patent or invention covering a lighting fixture, which was superior to Brascolite at that time; what would you consider, or what in your opinion would be the fair market value of a product (property) at that time, of the product (property) that was being offered to you for sale or for purchase?"

This hypothetical question assumes first that the Briterlite was superior to the Brascolite and, second, that the Briterlite invention on March 1, 1913, was such a property right that a purchaser of it could have secured patent or could have obtained exclusive rights to manufacture and sell the invented article.

Either due to the excitement of the constant argument in the case or slips in stenographic reporting, the question may not appear as clearly worded as it should have been. However, the witness heard the argument of counsel just preceding the question, and his answer, together wtih his explanation of his answers, as fully covered by his cross-examination [Tr. pp. 72-77] can leave no doubt that he correctly interpreted the question and gave competent answers directly relevant and material to the issue involved.

Since the Board found as a fact that the Briterlite was superior to the Brascolite and this finding is undoubtedly supported by the evidence, the question is not faulty by presenting such superiority as a fact to be assumed in making answer to the question.

We have endeavored hereinbefore to show that the Briterlite invention carried with it on March 1, 1913, the right to exclusive use (*supra,* p. 16) and we rely upon that showing as support for inclusion in the question, the assumption as a fact that the invention did carry with it such exclusive use.

A peculiar question arises in connection with the cross-examination. If the testimony on direct examination as to value was rejected, then the testimony on that question

upon cross-examination has the same effect as though the witness were the witness for the respondent, and the respondent is bound by his testimony. "It is in the discretion of the court to permit the defendant, upon cross-examination of the plaintiff's witnesses, to examine them in relation to matters not touched upon in the direct examination, but as to such matters the defendant, by so doing, makes the witness his own." *Chicago Ex. Bldg. Co. v. Merchants Bldg. Imp. Co.,* 83 Ill. App. 241: "To cross-examine a person as to matters about which he has not testified in chief is, in effect, to make said person a witness for the party cross-examining, and to waive an objection as to his competency." (*Miller v. Miller's Adm., et al.,* 92 Va. 510, 23 S. E. 891; see, also, Cal. C. C. P., sec. 2048.) It seems that the testimony on cross-examination was so strong that the least effect it could have would be to strengthen the direct examination and correct any deficiencies. A few of the answers of the witness on cross-examination are more forceful than any further argument we can present:

"By Mr. Wilson:

Q. What do you mean by 'fair market value'? A. I would say by 'fair market value' the price at which an article could be sold to a concern for the promotion or manufacture of it, and price that they would be willing and ready to pay for such a right to manufacture.

By Mr. Wilson:

Q. Now, keeping out of your mind, Mr. Fugate, the information and knowledge you have at the present time with regard to this development of this Briterlite and Brascolite, and putting yourself—plac-

ing yourself back, figuratively speaking, to on or about March 1, 1913, do I understand you to testify that you would have on that date—you would have been willing on that date to have paid one hundred thousand dollars for the Briterlite invention? A. I did.

* * * * * * * *

By Mr. Wilson:

Q. All right, now, let us understand each other; this statement you made that in your opinion the fair market value of that invention on March 1, 1913, was one hundred thousand dollars, that statement is predicated, is it not, Mr. Fugate, on the assumption that the invention on that date carried with it the exclusive right to manufacture—in other words, a patent? A. *A patent, or the fact that this invention, the idea, was patentable."*

The witness, Frank N. Cooley, was first asked the following question [Tr. p. 79]:

"By Mr. Koster:

Q. Assuming that you were able to purchase an invention with the exclusive rights to manufacture and sell the product covered by that invention, and that invention was of an indirect lighting fixture which was superior at that time, and by 'that time', I mean on or about March 1, 1913, to the other indirect lighting fixtures with which it might compete. What would you—what, in your opinion, would be the fair market value of such an invention with the rights—exclusive rights—pertaining thereto, be as of March 1, 1913?"

After objection and argument and the witness' response, solicited by the Board member, that he had not

become familiar with the Briterlite fixture until about five or six years ago, the question was reframed and asked as follows [Tr. p. 81]:

"By Mr. Koster:

Q. Assuming that the Briterlite invention carried with it the exclusive rights to manufacture and sell the Briterlite fixture, which was a lighting fixture superior to other indirect lighting fixtures in existence on or about March 1, 1913, what in your opinion would be the fair market value as of March 1, 1913, of that Briterlite invention?"

As in the question propounded to the witness, Fugate, this question assumed as facts first that the Briterlite invention on March 1, 1913, carried with it the right to exclusive use and second, that the Briterlite was a superior fixture to those most prominently in use on that date. As hereinbefore argued, we feel these facts are established by the evidence introduced before the witnesses Fugate and Cooley were called upon to testify, and we urge that the questions were proper. (See *Empire Machine Co. v. Commissioner,* 16 B. T. A. 1099, 1109). After considerable argument the Board Member asked the following questions concerning the question above quoted [Tr. pp. 84-85]:

"By the Member:

Q. I will ask you now, can you answer that question,—I am not asking you to answer it at present; I am asking you to tell me whether you can answer it or not. A. Yes.

Q. Do you know whether or not the Briterlite was superior to the other makes of light that you state were being manufactured in 1912 and 1913,

with which you were then familiar? A. From information which I have had in the last five years, I believe that the Briterlite is of better design than the Brascolite or other lights that I had come in contact with up to that time."

After the witness had expressed his opinion that the value was $300,000 and gave his reasons for his opinion, the Board member inquired whether that was the value on March 1, 1913, to which the witness responded [Tr. p. 86]:

"A. Yes, because that was the time when it was very valuable; it is not now, because of all the competition."

The cross-examination of this witness did not in the slightest, impeach or weaken the testimony of this witness, and in fact the information adduced on cross-examination supported the direct testimony. [Tr. pp. 86-87.]

"By Mr. Wilson:

Q. If there had been on March 1, 1913, any doubt as to the possibility of securing patent, or if at that time no application for patent had ever been filed, would that make any difference in the valuation, in your opinion? A. Yes, sir, I should want to be assured of the exclusive right to manufacture.

By the Member:

Q. Now, the value you gave is your opinion of the value as of March 1, 1913, is that right? A. Yes, Your Honor.

Q. And you assume that the article that was described to you was being manufactured on or about March 1, 1913? A. Yes, Your Honor.

Q. And did you give your opinion of the value in the light of conditions that existed on March 1, 1913, in this line of business? A. Yes, Your Honor."

We submit that the Board erred in rejecting the testimony of the witnesses Fugate and Cooley as set out in the assignments of error numbers VIII and IX.

In concluding this section of this brief, we respectfully submit the following quotation from the United States Supreme Court decision in the case of *Montana Ry. Co. v. Warren*, 137 U. S. 350, in which the court analyzes the admissibility of testimony regarding market value and we respectfully submit that the evidence in this proceeding is admissible under the Supreme Court's decision:

". . . That his mining claim, which may be called 'only a prospect,' had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such 'prospects' are the constant subject of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. *And yet, uncertain and speculative as it is, such 'prospect' has a market value;* and the absence of certainty is not a matter of which the Railroad Company can take advantage, when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the Railroad Company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities. *In respect to such value,*

the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate. True, in large cities, where articles of personal property are subject to frequent sales, and where market quotations are daily published, the value of such personal property can ordinarily be determined with accuracy; but even there, where real estate in lots is frequently sold, where prices are generally known, where the possibility of rental and other circumstances affecting values are readily ascertainable, common experience discloses that witnesses the most competent often widely differ as to the value of any particular lot; and there is no fixed or certain standard by which the real value can be ascertained. The jury is compelled to reach its conclusion by comparison of various estimates. Much more so is this true when the effort is to ascertain the value of real estate in the country, where sales are few, and where the elements which enter into and determine the value are so varied in character. And this uncertainty increases as we go out into the newer portions of our land, where settlements are recent and values formative and speculative. *Here, as elsewhere, we are driven to ask the opinions of those having superior knowledge in respect thereto. It is not questioned by the counsel for plaintiff in error that the general rule is that value may be proved by the opinion of any witness who possesses sufficient knowledge on the subject;* but their contention is, that the witnesses permitted to testify had no such sufficient knowledge. It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge. Stillwell & B. Mfg. Co. v.

Phelps, 150 U. S. 520 (32:1035); Lawrence v. Boston, 119 Mass. 126; Chandler v. Jamaisa Pond Aqueduct Corp., 125 Mass. 544. The witnesses whose testimony is complained of, all testified that they knew the land and its surroundings; and many of them that they had dealt in mining claims situated in the district, and had opinions as to the value of the property. It is true, some of them did not claim to be familiar with sales of other property in the immediate vicinity; and the want of that means of knowledge is the specific objection made in the Supreme Court of the territory to the competency of those witnesses. But the possession of that means of knowledge is not essential. It has often been held that farmers living in the vicinity of a farm whose value is in question, may testify as to its value, although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. *After a witness has testified that he knows the property and its value, he may be called upon to state such value.* The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination. *And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence.*

"We think the Supreme Court of Montana was right in holding that no error was committed in permitting the testimony of these witnesses. These are all the questions submitted to that court; and its ruling in respect thereto being correct, its judgment is affirmed." (Italics ours.)

Conclusion.

In conclusion, we respectfully urge that the Board erred in disregarding the entire evidence adduced by the petitioner, and that its findings of facts and decision are not supported by the evidence which shows conclusively that the Briterlite invention had a fair market value on March 1, 1913; and we respectfully pray that this Honorable Court remand the proceeding to the Board with directions to find a value of $100,000.00 for the Briterlite invention as of March 1, 1913, which is the value claimed by the petitioner though there is some evidence indicating a much higher value; or, that this Honorable Court grant such other relief as it may seem proper in order that the interests of justice may be best served.

Respectfully submitted,

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No. 6951

In the United States Circuit Court of Appeals for the Ninth Circuit

ALMA I. WAGNER, EXECUTRIX OF THE ESTATE OF ROBERT G. WAGNER, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

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CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

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v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR RESPONDENT

PREVIOUS OPINION

The only previous opinion in this case is that of the Board of Tax Appeals (R. 18–21) which is reported in 23 B. T. A. 879.

JURISDICTION

This appeal involves a deficiency in federal income taxes for the calendar year 1920 in the sum of $13,380.44 (R. 4, 14), and is taken from a decision of the Board of Tax Appeals entered June 29, 1931 (R. 20–21). The case is brought to this

Court by petition for review filed December 16, 1931 (R. 21–25), pursuant to the provisions of the Revenue Act of 1926, c. 27, Sections 1001, 1002, 1003, 44 Stat. 9, 109, 110.

QUESTION PRESENTED

Whether the petitioner has overcome the presumptive correctness of the Commissioner's determination that an invention had no fair market price or value on March 1, 1913.

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—
>
> (1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and
>
> (2) In the case of property acquired on or after that date, the cost thereof * * *.

STATEMENT OF FACTS

The facts as found by the Board of Tax Appeals are as follows (R. 14–18):

The petition is filed in the name of Alma I. Wagner, as executrix of the Estate of Robert G. Wagner, deceased. Robert G. Wagner is hereinafter referred to as the decedent.

The decedent was an individual with office at 830 South Olive Street, Los Angeles, California.

In 1911 the decedent and one Ernest J. Schweitzer were the owners of the stock of the Wagner-Woodruff Corporation, a corporation engaged in the business of manufacturing and selling electric lighting fixtures in Los Angeles. About that time, due to the fact that a new type of gas light was brought out which was very bright, several kinds of indirect electric lighting fixtures appeared on the market. Among these were the Brascolite, manufactured by the St. Louis Brass Works, and the Phoenix Light. Most of the commercial houses—General Electric, Edison Co., and others—were putting in these indirect lighting fixtures. In 1912 and 1913 the Brascolite was the most popular one of these types of fixtures and was in great demand. At that time the Brascolite had been installed in a great many commercial buildings in Seattle, Denver, Salt Lake City, Chicago, Minneapolis, Detroit, and the important Eastern cities. This fixture is still in great demand.

This Brascolite fixture was an indirect lighting unit having a translucent globe inverted and a reflecting pan above it.

In 1912 Schweitzer and the decedent, working in the factory of the Wagner-Woodruff Corporation, invented an indirect electric lighting fixture which they called the Briterlite. This was a lamp

mounted in a globe of translucent material and having above it a downwardly reflecting reflector of curved contour so as to diffuse the light downward. These lights were being manufactured and sold to a very limited extent in 1912 and 1913. In January or February, 1913, the decedent and Schweitzer had obtained a contract for the production and installation of a number of "Briterlite."

Schweitzer and the decedent in the latter part of 1912 consulted Frederick S. Lyon, an attorney at law, who, at that time, had been engaged for about 20 years in practicing exclusively in patent, trademark, and copyright matters, and who had represented decedent in a number of patent matters. Lyon caused an examination of the records of the patent office to be made and rendered to Schweitzer and the decedent an opinion or report as to the patentability of the Briterlite invention. He advised Schweitzer and the decedent that the Briterlite did not infringe the original Guth patent, which was the patent covering the Brascolite. The Guth patent had been originally in litigation and the original claims were held to a certain limitation. Subsequently an application was made by the owner of the Guth patent for a reissue or amended patent on the Guth invention and a reissue was granted. The result was that while the Guth patent was sustained generally the rights of the decedent and Schweitzer could not be cut off because they were

intervening rights, the decedent and Schweitzer having invested their money, made their application for patent, and gone into actual manufacture of the Briterlite. Decedent and Schweitzer were thus able to continue in the manufacture and sale of the Briterlite without regard to the fact that the reissue of the Guth patent shut out others who were not licensed. The only fixture in competition with the Brascolite and which did not infringe the Guth patent was the Briterlite, because of the intervening rights of the decedent and Schweitzer.

One of the material differences between the Briterlite and the Brascolite was that the upper reflecting surface of the Brascolite or Guth patent was flat. The original Guth patent was limited to a flat upper reflecting surface and to the patent arrangement of the other reflecting surfaces with relation to it. The Briterlite differed essentially in that it had a curved pan at the top. It was not within the scope of the original Guth patent although the reissued Guth patent did not limit the Guth invention in that same manner. The Briterlite also had three hooks on the bowl and the bowl could be more easily removed than the bowl on the Brascolite. The Briterlite was an improvement over other fixtures of the same type and could be sold readily in competition with them.

An application for patent covering the Briterlite fixtures was filed some time during the year

1914, and a patent was thereafter granted about September 21, 1915.

The Briterlite was made in about eight different sizes and styles. In 1913 the best seller sold for from $18 to $20. In computing the sales list price for the Briterlite the cost of labor and material was taken as a basic cost and 50 per cent of this amount added for overhead. The retail selling price was double that amount.

In 1920 the demand for these indirect lighting fixtures was not as great because a new type of glass had been invented which was thin in texture so as to allow maximum rays of light to pass entirely through the glass. This was very cheap to market.

In 1920 the decedent and Schweitzer sold the patent on the Briterlite fixture to the Wagner-Woodruff Corporation for $85,000. They each owned a one-half interest in this patent. The respondent determined that the decedent derived an income from this transaction in the amount of $42,500.

The Board approved the Commissioner's determination and the petitioner appeals.

SUMMARY OF ARGUMENT

The filing of an amended assignment of errors is not permitted under the rules of this Court. Consequently the only question before the Court is whether upon the facts as found there was error in giving judgment for the respondent.

In any event the Commissioner's determination was prima facie correct and it was the petitioner's burden to prove error. The invention here to be valued had not been patented nor had an application for patent been filed on or before March 1, 1913. The evidence adduced on behalf of the petitioner was of opinion character and the weight to be given to such evidence is a matter solely for the judgment of the Board. No facts are found in the record to support the opinion testimony offered. Under these circumstances the Board correctly approved the Commissioner's determination that the invention had no value on the basic date.

ARGUMENT

The Board of Tax Appeals did not err in its conclusion that there was no evidence to show that the Commissioner's determination was erroneous

Petitioner has assigned error in the Board's finding as to the fact of value but has failed to set forth in the assignment of errors the evidence relied upon. In such a case an appellate court is necessarily restricted to the question whether upon the facts as found there was error in giving judgment for the respondent. *Prentice* v. *Stearns,* 113 U. S. 445. The petitioner attempted to correct this omission by filing amended assignment of errors in this Court approximately eleven months after the petition for review was filed. This practice is

not in accord with Rule 11 of this Court. The rule provides:

> When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. * * * Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the Court, at its option, may notice a plain error not assigned.

This Court has required strict adherence to this rule. *Loyd* v. *Chapman,* 93 Fed. 599. The same is true in other circuits. *Reed* v. *Anderson,* 236 Fed. 345 (C. C. A. 8th), and cases cited therein. It is submitted that the instant case is one calling for the application of this rule, as it is obvious that the errors attempted to be assigned by the proposed amendment do not come within the only exception named in the rule.

The errors attempted to be assigned in the proposed amendment relate to the action of the Board in sustaining the objection of the respondent to all opinion testimony as to the March 1, 1913, value. If these assignments are not considered by the Court there remains no evidence in the record as to the March 1, 1913, value, but even if such assign-

ments of error should be considered by the Court and the conclusion is reached that the Board erred in sustaining the objection to the opinion testimony of the various witnesses as to value, we submit that evidence of such a character would not warrant this Court in reversing the action of the Board.

Petitioner contends that the "Briterlite" invention had a value of $100,000 on March 1, 1913. It is submitted that no evidence was introduced before the Board to overcome the Commissioner's determination that the invention had no value on that date.

The Commissioner's determination is prima facie correct. *American Trust Co.* v. *Commissioner,* 31 F. (2d) 47 (C. C. A. 9th); *Anchor Co.* v. *Commissioner,* 42 F. (2d) 99 (C. C. A. 4th). And the burden is upon the petitioner to prove that such determination is erroneous. *Burnet* v. *Houston,* 283 U. S. 223; *Green's Advertising Agency* v. *Blair,* 31 F. (2d) 96 (C. C. A. 9th). The prima facie correctness of that determination can be overthrown only by a satisfactory proof of error (*Universal Steel Co.* v. *Commissioner,* 46 F. (2d) 908 (C. C. A. 3d)), or by substantial evidence (*Nichols* v. *Commissioner,* 44 F. (2d) 157 (C. C. A. 3d)). It would thus have been error for the Board to overthrow the Commissioner's determination in the absence of proof sufficient to support a finding contrary to the Commissioner's determination. *Commissioner* v.

Langwell Real Estate Corporation, 47 F. (2d) 841 (C. C. A. 7th); *Williams* v. *Commissioner,* 45 F. (2d) 61 (C. C. A. 5th); *Louisville Cooperage Co.* v. *Commissioner,* 47 F. (2d) 599 (C. C. A. 6th). This Court stated in *Matern* v. *Commissioner,* No. 6775, decided November 14, 1932:

> In other words, the presumption of correctness is attached to the Commissioner's findings. The Board of Tax Appeals, after weighing the evidence, found that such evidence was not sufficient to rebut the presumption. The duty of weighing the evidence rests upon the Board, and not upon this Court.

To overthrow this presumption petitioner relied solely upon opinion evidence. The Board is not obligated to accept opinion evidence as to value. *Grand Rapids Store Equipment Corporation* v. *Commissioner,* 59 F. (2d) 914 (C. C. A. 6th); *Am-Plus Storage Battery Co.* v. *Commissioner,* 35 F. (2d) 167 (C. C. A. 7th); *Anchor Co.* v. *Commissioner, supra.* In *Balaban & Katz Corporation* v. *Commissioner,* 30 F. (2d) 807 (C. C. A. 7th), it was said (p. 808):

> Opinion evidence, to be of any value, should be based either upon admitted facts or upon facts, within the knowledge of the witness, disclosed in the record. Opinion evidence that does not appear to be based upon disclosed facts is of little or no value. The

> opinion witnesses here were almost wholly without facts to support their conclusions, and it was within the province of the Board to disregard the opinion evidence and base its opinion upon the facts in the record before it.

The case of *Guy* v. *Commissioner,* 35 F. (2d) 139 (C. C. A. 4th), is to the same effect. Similarly in the instant case the opinion testimony is based neither upon admitted facts nor upon facts disclosed in the record. It should be noted that this proceeding does not involve the determination of the March 1, 1913, value of a patent, a patented invention or an invention for which an application had been filed on or before March 1, 1913. Application for patent was filed in December, 1914, and the patent was granted September 21, 1915. (R. 7, 87.) Yet the witness Gordon assumed that the article to be valued was a patent. (R. 63–65.) Witness Fugate's testimony dealt with the exclusive "right to manufacture" a fixture such as the "Briterlite." (R. 72–73.) Of course, petitioner had no such right to sell on March 1, 1913. The witness also erroneously assumed that a patent was being valued (R. 76–77), and when asked whether he would have given $100,000 for the invention if there had been any doubt about the issuance of a patent and the exclusive right to manufacture and sell, he replied, "I think that point would have

had to have been cleared up, sir" (R. 77). The opinion of Witness Cooley discloses that he had in mind the value of the privilege of exclusive manufacture of a patented invention or one whose patent was assured. (R. 86–87.)

The record is very meager as to the extent to which the "Briterlite" fixture was being manufactured, sold, and distributed on March 1, 1913. Witness Lyon testified that there was but one commercial installation prior to the summer of 1913. (R. 34.) The co-inventor of the "Briterlite" fixture testified that he did not know without observing the records the extent of the manufacture of the "Briterlite" up to March 1, 1913. (R. 51.) It is a fair inference that had the fixture been manufactured to any extent at the basic date the records would have been introduced in evidence. Mr. Fugate testified that the majority of the new jobs which had been installed in January and February of 1913 were of the indirect type (R. 74–76), but this does not necessarily mean that the "Briterlite" fixture was the type installed. There were at least three other lights of the "Briterlite" class being manufactured at that time. (R. 83.) Thus on the very important element of the extent of the sales we find the evidence to be so vague as to be of little help in determining the value of the invention. Even the cost of developing the invention is not shown in the evidence.

On the question of the fair market value of the invention as of March 1, 1913, Mr. Schweitzer limited his testimony to the price which he and his coinventor had agreed represented the value of the invention to themselves. (R. 49–50.) This testimony was given subject to respondent's objection, which was later sustained. But even if improperly rejected, clearly this is no indication of market value. The other witnesses, as shown above, had in mind a patented article or an exclusive right to manufacture, neither of which is here involved. In this connection it should be noted that there was on March 1, 1913, a patented invention, the "Brascolite," which was quite similar to the "Briterlite," and it was not until after that date that the limitations of the patent covering the former were clearly defined. This, no doubt, accounts for the reservation found in the testimony of all the witnesses that their opinion of the value of the invention was predicated upon an assured patent.

It is submitted that a careful review of the opinion testimony will disclose no facts upon which a determination of the March 1, 1913, value of the invention could be based. For that reason the Board could have correctly rejected the opinion evidence offered. Under the authorities cited above the weight that was to be given to the testimony was for the Board to decide.

It may be conceded for the purpose of the argument that an invention prior to the issuance of a patent thereon and even prior to the filing of an application for a patent is property capable of being bought and sold. In *Durham* v. *Seymour,* 161 U. S. 235, the Court said (p. 238):

> * * * the discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner in which the law requires * * *.
>
> So rights growing out of an invention may be sold, whether the sale in any case carries with it anything of value or not.

But the petitioner argues that decedent's rights as an inventor are tantamount to rights under a patent. (Br. 22.) This does not appear to be a correct statement of the law. A patent gives one the right to exclusive enjoyment of his invention. *Crown Die & Tool Co.* v. *Nye Tool & Machine Works,* 261 U. S. 24; *Continental Paper Bag Company* v. *Eastern Paper Bag Company,* 210 U. S. 405. Until the patent is issued there is no exclusive right to use the invention, and the granting of the patent does not retroactively confer the exclusive right back to the date of application.

In *Aronson* v. *Orlov,* 228 Mass. 1, the court said (p. 28):

> No rights exist under a patent until a patent has been granted. It has been decided repeatedly that there can be no recovery in the ordinary case for use of a patented article made before the patent was granted. The inventor has no exclusive right before a patent has been issued to him. The patent is not retroactive to a date prior to the grant. The establishment of the monopoly does not antedate the grant of the patent. That grant is fixed as of its date. *Kirk* v. *United States,* 163 U. S. 49, 55; *Gaylor* v. *Wilder,* 10 How. 477, 493; *Marsh* v. *Nichols, Shepard & Co.,* 128 U. S. 605, 612. *Brown* v. *Duchesne,* 19 How. 183, 195; *Sargent* v. *Seagrave,* 2 Curt. 553, 555. The grant of a patent can not be antedated. It takes effect as of the date when actually issued, and not before. *Marsh* v. *Nichols, Shepard & Co.,* 128 U. S. 605, 616. It is, it seems to us, an unavoidable result from this principle that prior to the issuance of a patent no case can arise under the patent laws respecting the relative rights of parties to or under a patent.

It would thus appear that the inventor's rights are far from being "tantamount to rights under a patent."

CONCLUSION

It is respectfully submitted that the decision of the Board of Tax Appeals is in accordance with the law and should be affirmed.

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JOHN G. REMEY,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.
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Bureau of Internal Revenue,
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NOVEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

No. 6962

United States
Circuit Court of Appeals
For the Ninth Circuit

SHELL OIL COMPANY, a California corporation,

Appellant,

vs.

INDEPENDENT PETROLEUM COMPANY, a Washington corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

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MESSRS. PEYSER & BAILEY,
Solicitors for Appellee,
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Seattle, Washington. [1*]

In the Superior Court of the State of Washington for King County.

No. 254,982

INDEPENDENT PETROLEUM COMPANY, a Washington corporation,

Plaintiff,

vs.

SHELL OIL COMPANY, a California corporation,

Defendant.

COMPLAINT.

Plaintiff complains and alleges as follows:

I.

That at all times herein mentioned plaintiff was and now is a Washington corporation, with its principal place of business in Seattle, King County,

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Washington; that it has paid all its license fees due to the State of Washington and is in all respects capable and competent to do business in said state.

II.

That the defendant, Shell Oil Company, is a California corporation; that it does business generally throughout the State of Washington and maintains a divisional office and plant in Seattle, King County, Washington.

III.

That the plaintiff is engaged as a jobber in selling gasoline and other petroleum products at wholesale to dealers in Seattle and King County, Washington.

IV.

That the defendant is in the business of selling and distributing gasoline and other petroleum products on the Pacific Coast, both direct to dealers and to wholesalers such as plaintiff herein. [2]

V.

That on the 25th day of November, 1929, plaintiff and defendant entered into a contract, under the terms of which the plaintiff agreed to purchase all of the gasoline sold by it over a period of time therein stated, from the defendant; that a copy of said contract is attached hereto, marked Exhibit "A," and by reference made a part hereof; that said contract provides in part as follows:

"It is mutually understood and agreed that gasoline so bought from said Shell Company by said Petroleum Company is to be Shell gasoline of the quality the Shell Company is at the time of delivery selling to its dealer trade generally in Seattle, Washington.

It being further understood that the word 'Gasoline' as used throughout this contract shall be construed to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude special refined or blended gasolines sold by it for special purposes at an increased price or prices."

VI.

That from the said 25th day of November, 1929, up to and including the present time, plaintiff has either complied with each and every provision of said contract or the compliance thereof has been specifically waived by the defendant; that relying upon the terms of the above said contract and the rights accruing to it thereby, the plaintiff has invested large sums of money in trucks, building and leasing service stations, and purchasing and leasing other necessary equipment with which to properly carry on its business under the terms of said contract.

VII.

That, further relying upon the terms and provisions of the above said contract, plaintiff has

entered into agreements with approximately sixty dealers, wherein plaintiff has agreed and guaranteed to sell said dealers the gasoline provided for, to-wit, under the terms of said contract with the defendant corporation. [3]

VIII.

That the contract hereinabove mentioned between plaintiff and defendant also contains the following provision:

"It is mutually understood and agreed that either the Shell Company or the Petroleum Company may terminate and cancel this contract on twelve months' notice to the other party, provided said notice may not be given prior to November 30th, 1930."

That pursuant to the terms of said provision the defendant corporation, on or about February 28, 1932, gave twelve months' notice of its intention to terminate the said contract; that at the time of bringing this suit there remains approximately seven and one-half months' time, during which the defendant corporation is still bound by the terms of its said contract.

IX.

That on or about the 1st day of July, 1932, the defendant corporation placed on the market generally throughout the Pacific Coast and especially in the State of Washington, a gasoline known as

"SHELL GREEN SPOT," which said gasoline the defendant is selling to the dealer trade, particularly in King County, Washington; that in direct breach and violation of the provisions of its said contract as hereinabove more specifically set forth in paragraph V hereof, the defendant has knowingly and wilfully refused to sell to the plaintiff any of the said Shell Green Spot gasoline; that plaintiff has repeatedly demanded from the duly authorized officers of the defendant corporation in charge of the Seattle, Washington, office, and the Washington district of said corporation, that the contract be complied with in this respect, but said officers have failed and refused, and at the time of bringing this said suit fail and refuse to furnish plaintiff with any of the said Shell Green Spot gasoline, which, as aforesaid, the defendant is at the present time selling and delivering to the dealer trade and [4] service station operators generally in Seattle and throughout the State of Washington.

X.

That as a result of defendant's failure to comply with the provisions of the above said contract, plaintiff has sustained and will sustain great damage; that during the past two weeks its inability to furnish the said Shell Green Spot gasoline to its customers and dealers, has caused plaintiff to lose at least one-third of its business; that unless it is granted immediate relief as hereinabove requested plaintiff will suffer an even greater loss; that an

emergency exists and plaintiff has no speedy and adequate remedy at law; that there is no definite way plaintiff can at this time fix, ascertain or compute its full damage or the damage that it will sustain; that also by reason of its failure to furnish its dealers with Shell Green Spot gasoline, plaintiff has been threatened with a number of lawsuits and unless relief is given as herein sought, will be faced with the defense of a multiplicity of lawsuits.

XI.

That all of the major gasoline companies doing business as is the defendant herein, have placed on the market a grade of gasoline similar to that of Shell Green Spot, and that said gasoline is being sold generally to the dealer trade; that since the defendant has refused to furnish the said gasoline to plaintiff, plaintiff's officers and representatives have made every possible effort to purchase a similar grade of gasoline from other companies, all without avail, and it will be impossible for plaintiff to continue to do business unless the court forthwith directs the defendant corporation to comply with the terms of its said contract, and furnish plaintiff with [5] the said Shell Green Spot gasoline in the quantities and manner specified in said contract.

WHEREFORE, plaintiff prays that it may have injunctive relief against the defendant as follows:

First. That upon posting a proper bond in an amount fixed by the court, that a temporary injunc-

tion be issued herein directing the Shell Oil Company to immediately comply and fulfill the terms of its contract with the plaintiff herein and to forthwith furnish to plaintiff the said Shell Green Spot gasoline, in the manner and amounts provided for in said contract.

Second. That an order to show cause be issued from the above entitled court directing the defendant to appear in such department as the court may designate, on a day certain, to show cause, if any it may have, why the temporary injunction should not remain in full force and effect until the hearing of plaintiff's complaint herein and the allegations therein contained on their merits.

Third. That after the hearing of said cause on its merits, that the said injunction be made permanent, to remain in full force and effect during the remaining term of said contract.

Fourth. For its costs and disbursements herein to be taxed.

Fifth. For such other, further and different relief as to this Honorable Court may seem just and equitable under the existing circumstances and conditions.

PEYSER AND BAILEY,
Attorneys for Plaintiff. [6]

State of Washington,
County of King.—ss.

Phil L. Polsky, being first duly sworn, on oath deposes and says: That he is the president and general manager of the above named plaintiff corporation; that as such he is authorized so to do and makes this verification for and in behalf of said plaintiff; that he has heard read the within and foregoing complaint, knows the contents thereof, and believes the same to be true.

PHIL L. POLSKY.

Subscribed and sworn to before me this 13th day of July, 1932.

[Seal] JAMES M. BAILEY,
Notary Public in and for the State of Washington, residing at Seattle.

Filed in County Clerk's Office, King County, Wash., Jul. 13, 1932. Abe N. Olson, Clerk. By S. R. Battenfield, Deputy. [7]

EXHIBIT "A."

AGREEMENT entered into this 25th day of November, 1929, between SHELL OIL COMPANY, a California corporation, hereinafter referred to as Shell Company, and INDEPENDENT PETROLEUM COMPANY, a Washington corporation, hereinafter referred to as Petroleum Company.

The Petroleum Company agrees to buy from the Shell Company and the Shell Company agrees to sell to the Petroleum Company, on the terms and

in the manner hereinafter set forth, all the gasoline for use and resales in the City of Seattle and its immediate and adjacent suburbs, which the Petroleum Company requires and deals in, said quantity not to be less than 1,200,000 gallons, nor more than 4,000,000 gallons in any one year, reckoning from December 15, 1929, and not less than 100,000 gallons, nor more than 400,000 gallons for any one month, reckoning from December 15, 1929, said quantities to be bought, received and paid for by the Petroleum Company in a month or year as the case may be.

It is mutually understood and agreed that gasoline so bought from said Shell Company by said Petroleum Company is to be Shell gasoline of the quality the Shell Company is at the time of delivery selling to its dealer trade generally in Seattle, Washington.

It being further understood that the word "Gasoline" as used throughout this contract shall be construed to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude all special refined or blended gasolines sold by it for special purposes at an increased price or prices.

As a material consideration for which this contract would otherwise not be given, the Petroleum Company hereby [8] agrees to enter into a lease with the Shell Company covering certain real prop-

erty and equipment (together hereinafter called a plant) located and owned by the Shell Company in the City of Seattle and at such definite place and at such time as the Shell Company shall hereafter designate. Said lease shall be for the term and exist only as a part of this contract, so that if for any cause whatsoever the contract shall be terminated, the said lease shall likewise be rendered null and void and of no further force or effect. The Shell Company hereby agrees to fully equip said plant for the handling of petroleum products thereon, and the rental for said equipment and real property shall be the sum of one hundred twenty-five (125) dollars per month, payable in advance on the first day of each month during the term of this contract; which sum the Petroleum Company hereby promises and agrees to pay.

The Petroleum Company hereby agrees, on said leased property and through said equipment thereon, to use only products supplied to it by the Shell Company, and a violation of this covenant shall render this contract and the above mentioned lease immediately terminable at the option of the Shell Company. In that event the Shell Company may, without any liability whatsoever, enter upon the leased premises and take possession thereof and of all equipment and appurtenances thereon.

Deliveries to the Petroleum Company shall be by: Pipe line direct from the Shell Company's Harbor Island installation at Seattle to the Plant herein-

before referred to. The quantity of gasoline so delivered shall be determined by meter located on this pipe line based on a temperature correction at 60° Fahrenheit, using .00065 as the expansion coefficient per degree Fahrenheit. [9]

However, it is understood and agreed by the parties hereto that until such time as the Shell Company shall build and equip the above referred to Plant it will fill the Petroleum Company's tank trucks at the Shell Company's truck fillstands located in its Seattle Installation yard.

The price for all gasoline delivered shall be six and one-half cents (6½¢) less than the Shell Company's tank wagon price for commercial gasoline as determined and posted at Shell Company's Seattle, Washington Installation. All gasoline is to be paid for in cash at the time of delivery.

On the date this contract is written, dealers in the City of Seattle, Washington, are being priced at four cents (4¢) per gallon less than Shell Company's posted tank wagon price. Therefore, in naming a price to the Petroleum Company of six and one-half cents (6½¢) under the posted tank wagon price, it is the intention of the price paragraph next above that the Petroleum Company be given a margin of two and one-half cents (2½¢) per gallon under the prevailing price to dealers.

All deliveries hereunder are to be made subject to Federal, State, County, Municipal and Government taxes, laws and regulations covering or appli-

cable to the transportation or delivery of gasoline and any additional cost to the Shell Company in making deliveries of said gasoline under this contract, because of any future taxes, laws, or regulations not now in effect, shall be borne and paid for by the Petroleum Company.

The Shell Company is not to be held liable for damages or delays occasioned by or arising from acts of God, enemy of the United States, blockade, revolution, invasion, war, perils of the sea, strikes or other labor disturbances, epidemics, stoppage or exhaustion, partial or total, of [10] petroleum wells, suspension or discontinuance of operation of refineries, interference of civil or military authorities or total or partial failure of any of the usual transportation or delivery facilities by which gasoline is transported from the point of production to the place of delivery hereunder or by any other cause beyond the control of the Shell Company.

In the event that the Petroleum Company fails to accept delivery of, in any one month, as much as one hundred thousand (100,000) gallons of gasoline, the monthly minimum under this contract, the Shell Company shall have the option: 1. Of refusing to proceed further hereunder and sue for damages for breach of the entire contract; 2. of suing for damages for the failure to accept delivery and pay for the difference between one hundred thousand (100,000) gallons and the quantity accepted by the Petroleum Company during the

month and; 3. of waiving the breach. In the event the Petroleum Company breaches any of the conditions or terms of this contract, the Shell Company shall have the right to treat the whole contract as broken and sue for damages therefor, forthwith. A waiver of one default shall not be construed as a waiver of any subsequent defaults.

The Petroleum Company agrees that it will not sell gasoline purchased under this contract to dealers or any other class of trade at a price less than the price at which the Shell Company is at that time making deliveries to dealers for that class of trade to which the Petroleum Company is making the sale.

The Petroleum Company agrees that it will not make delivery of gasoline to a service station or garage or other class of business being serviced by a competitive oil company in such manner as to interfere with the Code of Ethics as established by the American Petroleum Institute. [11]

The Petroleum Company further agrees that it will not make deliveries of gasoline to any service station or commercial account taking one hundred per cent of its requirements from the Shell Company, without first obtaining written authority from the Shell Company to make such deliveries.

The Petroleum Company further agrees that it will not make deliveries into a gasoline dealer's Shell pump located at any split pump dealer account, which is painted Shell colors.

The Petroleum Company further agrees that it will not sell lubricating oil to one hundred per cent dealers, split pump dealers, or any other class of trade where the account to whom the sale is made replaces in whole or in part its requirements of Shell lubricating oil.

The Petroleum Company further agrees that it will purchase all of its Lubricating Oil requirements from the Shell Company and will resell such Lubricating Oils under its own brand, which shall be distinctive and in no way similar to the brands used by the Shell Company.

The Petroleum Company further agrees that all pumps being serviced by the Petroleum Company will carry distinctive advertising colors of the Petroleum Company, which shall not in any way be similar to those of the Shell Company, and that it will not allow any dealers taking deliveries from the Petroleum Company to change the painting or trade marks or identification in such a way as to correspond in any way with the colors, trade marks or identification of the Shell Company.

It is understood that the Petroleum Company will distribute gasoline to its accounts in equipment belonging to the Petroleum Company, which are properly painted and identified in Petroleum Company colors, which in no way [12] correspond to the colors of the Shell Company. It is further understood that these trucks will be operated and maintained by the Petroleum Company.

The Petroleum Company further agrees that it will sell and distribute gasoline purchased from the Shell Company without adulteration or coloring of any kind.

It is mutually understood and agreed that either the Shell Company or the Petroleum Company may terminate and cancel this contract on twelve months' notice to the other party, providing said notice may not be given prior to November 30, 1930.

IN WITNESS WHEREOF, the Shell Oil Company has caused these presents to be duly executed on its behalf and the Independent Petroleum Company has caused these presents to be duly executed on its behalf by its President and Secretary the day and year first herein written.

SHELL OIL COMPANY,

By H. R. GALLAGHER.

INDEPENDENT PETROLEUM COMPANY.

[Corporate Seal] By PHIL L. POLSKY,
President.

By JAMES M. BAILEY,
Secretary. [13]

State of Washington,
County of King.—ss.

On this 25th day of November, 1929, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Phil L. Polsky and James M. Bailey to me known to be

the President and Secretary of the Independent Petroleum Co., the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of the said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notary Seal] A. L. LEMCKE,
Notary Public in and for King County, residing at Seattle. My commission expires May 7, 1932.

[Endorsed]: Filed Jul. 29, 1932. Ed. M. Lakin, Clerk. [14]

[Title of Court and Cause.]

PETITION FOR REMOVAL.

To the Honorable the Superior Court of the State of Washington for King County:

The petition of the defendant, Shell Oil Company, a California corporation, in the above entitled action, appearing herein specially and not otherwise, shows:

That heretofore and on or about the 13th day of July, 1932, the above entitled action, which is an action of a civil nature, was brought in this Court by the above named plaintiff against your petitioner, as defendant; that your petitioner at the time of the commencement of the action, was, ever since has been, and still is, a foreign corporation organized and existing under and by virtue of the laws of the State of California, and a resident thereof; that the plaintiff Independent Petroleum Company, was a Washington corporation at the time of the commencement of the above action, ever since has been and now is, a corporation organized and existing under and by virtue of the laws of the State of Washington; that the within action is one of a civil nature and that the controversy and amount in dispute in said action, exclusive of interest and costs, exceeds the sum of $3000.00; that the complaint alleges that the plaintiff has sustained and will sustain great damage in that the defendant has failed and refused to furnish "Green Streak" gasoline to the plaintiff, by reason of which the plaintiff has been caused to [15] lose at least one-third of its business; that the purchases of the plaintiff from the defendant of gasoline approximate 13,000 gallons per day at an average purchase price of 14½¢ per gallon, or $1885.00 per day, and which would approximate $26,390.00 in two weeks' time; that the contract provides for the delivery by the defendant to the plaintiff a monthly minimum of not less than 100,000 gallons, nor more

than 400,000 gallons, which, at the current price of gasoline today, would approximate an average of $36,250.00 per month.

That the value of the property of which the defendant will be deprived by the decree sought in the above case exceeds $3000.00 and the value of the property which the plaintiff is seeking to obtain from the defendant by the relief which it is seeking will exceed the sum of $3000.00.

That there is a diversity of citizenship between the plaintiff and defendant.

That the within action is pending undetermined in this Court and the time has not yet arrived at which the defendant is required by the laws of the State of Washington, or the rules of the Superior Court of the State of Washington for the County of King, the Court in which this action is brought, to answer or otherwise plead to the complaint of the plaintiff.

That your petitioner desires to remove this action forthwith and within thirty days from the filing of this petition into the District Court of the United States for the District in which this action is pending, to-wit: the District Court of the United States for the Western District of Washington, Northern Division, and your petitioner makes and files with this petition, its bond with good and sufficient surety thereon, for its entering in such District Court of the United States within thirty days from the date of filing of this petition, a copy of the record in this

action, and for its paying all costs that may be awarded by the said District Court of the United States for the Western District of Washington, Northern Division, if said District Court shall hold that this action was [16] wrongfully and improperly removed thereto, and your petitioner prays that said surety and said bond may be accepted, and that this action may be removed into the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had in this court except the order to remove, as required by law, and that this Honorable Court make an order approving said bond and order of removal of said action, and to that end your petitioner will ever pray.

SHELL OIL COMPANY,
a California Corporation.
By P. E. LAKIN,
Assistant Division Manager of the Northern Division of the Shell Oil Company.

State of Washington,
County of King.—ss.

P. E. Lakin being first duly sworn on oath, deposes and says:

That he is the Assistant Division Manager of the Northern Division of the defendant Shell Oil Company, a corporation, appearing herein specially and not otherwise, and makes this verification for

and on its behalf and is authorized so to do; that he has read the above and foregoing petition for removal and knows the contents thereof, and the matters and things therein set forth are true, as he verily believes.

P. E. LAKIN.

Subscribed and sworn to before me this 15th day of July, 1932.

[Seal] IVAN L. HYLAND,
Notary Public in and for the State of Washington, residing at Seattle.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendant. [17]

Filed in County Clerk's Office, King County, Wash., Jul. 15, 1932, 9:10 A. M. SRB. Abe N. Olson, Clerk. By: S. R. Battenfield, Deputy.

[Endorsed]: Filed Jul. 29, 1932. Ed. M. Lakin, Clerk. [18]

[Title of Court and Cause.]

ORDER OF REMOVAL.

This matter coming on for hearing at this time upon the petition of the Shell Oil Company, a California corporation, appearing specially and not otherwise, and asking for removal of the above entitled action from the Superior Court of the State of Washington for King County, to the District Court of the United States, Western District

of Washington, Northern Division, and it appearing from said petition that this action is of a civil nature and that the controversy and the amount in dispute, exclusive of interest and costs, exceeds the sum of $3000.00, and that the controversy in this action is between citizens and residents of different states, plaintiff being a citizen and resident of the state of Washington, and the defendant being a citizen and resident of the state of California; and it appearing from said petition that said action is pending undetermined in this Court and that at the time of the filing of said petition the time had not yet arrived at which the defendant was required by the laws of the state of Washington or the rules of the Superior Court of the State of Washington for King County, the court in which this action is brought, to answer or plead to the complaint of the plaintiff, and it further appearing to this Court that the said defendant has presented a bond to this court as provided by law, and it further appearing that the said bond and petition are [19] sufficient to authorize the removal of said action to the District Court of the United States for the Western District of Washington, Northern Division;

NOW, THEREFORE, IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that said bond be and it is hereby accepted and approved, and that this court proceed no further in this action, and that the same be and it is hereby transferred to the District Court of the United States for the Western District of Washington,

Northern Division, and that the clerk of this court prepare and file a complete copy of the record of this court in the above entitled action, and certify to the same as a copy of said record, and forward the same to the clerk of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, in the County of King, State of Washington, within thirty days from the filing of the petition herein.

Dated at Seattle, Washington, this 18th day of July, 1932.

CALVIN S. HALL,
Presiding Judge.

Filed in County Clerk's Office, King County, Wash., Jul. 18, 1932. Abe N. Olson, Clerk. By: A. L. Lawrence, Deputy.

[Endorsed]: Filed Jul. 29, 1932. Ed. M. Lakin, Clerk. [20]

[Title of Court and Cause.]

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS: That we, SHELL OIL COMPANY, a California corporation, a corporation organized and existing under and by virtue of the laws of the State of California, as principal, and the United States Fidelity & Guaranty Company, a corporation duly authorized to carry on a surety business in the State of Washington, and duly author-

ized to execute the within bond as surety, are held and firmly bound unto INDEPENDENT PETROLEUM COMPANY, a Washington corporation, its successors and assigns, in the penal sum of Five Hundred ($500) Dollars, lawful money of the United States, for the payment of which sum well and truly to be made unto the said Independent Petroleum Company, a Washington corporation, its successors and assigns, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

This bond is upon the condition nevertheless, that WHEREAS said Shell Oil Company, a California corporation, principal herein and the defendant in the above entitled action, has filed its petition in the above entitled action in the Superior Court of the State of Washington for King County, for the removal of said cause therein pending, wherein the said Independent Petroleum Company, a Washington corporation, is plaintiff, and the said principal Shell Oil Company, a California corporation, is defendant, to the District Court of the United States for the Western District of Washington, Northern Division, [21]

NOW, THEREFORE, if the said principal shall enter in said District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the filing of its petition for the removal of said cause, a copy of the record in said action, and shall well and truly

pay to the plaintiffs all costs that may be awarded by the said District Court of the United States for the Western District of Washington, Northern Division, if the said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF, said SHELL OIL COMPANY, a California corporation, as Principal, and said United States Fidelity and Guaranty Company, a corporation, as Surety, have caused this instrument to be executed by their proper officers and attorneys thereunto duly authorized, this 15th day of July, 1932.

SHELL OIL COMPANY,
a California corporation.
By HYLAND, ELVIDGE & ALVORD,
Its Attys.,
Principal.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
[Seal] By FRANK DRISCOLL,
Attorney in Fact,
Surety.

Approved as to penalty, surety and form, this 18th day of July, 1932.

CALVIN S. HALL,
Presiding Judge.

Filed in County Clerk's Office, King County, Wash., Jul. 15, 1932. Abe N. Olson, Clerk. By S. R. Battenfield, Deputy.

[Endorsed]: Filed Jul. 29, 1932. Ed. M. Lakin, Clerk. [22]

In the District Court of the United States for the the Northern Division, Western District of Washington.

In Equity.

No. 944.

INDEPENDENT PETROLEUM COMPANY, a Washington corporation,

Complainant,

vs.

SHELL OIL COMPANY, a California corporation,

Defendant.

AMENDED BILL IN EQUITY.

Comes now the complainant herein and, pursuant to court order, but without waiving its exceptions herein filed and allowed by said court in its said order entered on the ..... day of August, 1932, but specifically reserving the same, alleges as follows:

I.

That at all times herein mentioned complainant was and now is a Washington corporation, with its

principal place of business in Seattle, King County, Washington; that it has paid all its license fees due to the State of Washington and is in all respects capable and competent to do business in said state.

II.

That the defendant Shell Oil Company, is a California corporation; that it does business generally throughout the State of Washington and maintains a divisional office and plant in Seattle, King County, Washington.

III.

That the complainant is engaged as a jobber in selling gasoline and other petroleum products at wholesale to dealers in Seattle and King County, Washington. [23]

IV.

That the defendant is in the business of selling and distributing gasoline and other petroleum products on the Pacific Coast, both direct to dealers and to wholesalers such as complainant.

V.

That on the 25th day of November, 1929, complainant entered into a contract with the defendant company, under the terms of which it agreed to purchase from the said defendant company all of the gasoline sold by complainant over a period of time in said contract stated, and the defendant agreed to sell to the complainant a stipulated

amount of gasoline each month during the existence of said contract; that a copy of said contract, marked Exhibit "A" is attached to and filed with the original complaint herein in the above entitled court; that said contract is by reference made a part hereof; that said contract provides in part as follows:

"It is mutually understood and agreed that gasoline so bought from said Shell Company by said Petroleum Company is to be Shell gasoline of the quality the Shell Company is at the time of delivery selling to its dealer trade generally in Seattle, Washington.

It being further understood that the word "Gasoline" as used throughout this contract shall be construed to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude special refined or blended gasolines sold by it for special purposes at an increased price or prices."

VI.

That from the said 25th day of November, 1929, up to and including the present time, complainant has either complied with each and every provision of said contract and the oral modifications thereto, or compliance thereof has been specifically [24] waived by the defendant; that relying upon the terms of said contract and the rights accruing to it thereby complainant invested large sums of money in trucks, service station equipment, building and

leasing gasoline service stations, and purchasing and leasing other necessary equipment with which to properly carry on its business under the terms of said contract; that complainant has developed and established a credit standing and general goodwill which, at the time of the defendant's breach of the contract as hereinafter more specifically detailed, was of a fair and reasonable value of $250,000.00.

VII.

That, further relying upon the terms and provisions of the above said contract, complainant entered into agreements with approximately 60 service station dealers in Seattle, King County, Washington, wherein complainant agreed and guaranteed to sell said dealers gasoline of a kind and quality provided for in its contract with the defendant company; that a list of said service stations is annexed hereto, marked Exhibit "B" and by reference made a part hereof; that the existence of said agreements was well known to the representatives of the defendant company, who in many instances, prepared and supervised the execution thereof.

VIII.

That the contract hereinabove mentioned between the complainant and defendant also contains the following provision:

"It is mutually understood and agreed that either the Shell Company or the Petroleum Company may terminate and cancel this contract on twelve

months' notice to the other party; provided said notice may not be given prior to November 30th, 1930;" [25]
that pursuant to the terms of said provision the defendant corporation, on or about February 28, 1932, gave twelve months' notice of its intention to terminate the said contract; that at the time of bringing this suit there remains approximately six and one-half months time during which the defendant corporation is still bound by the terms of its said contract.

IX.

That on or about the 1st day of July 1932, the defendant corporation placed on the market generally throughout the Pacific Coast, and especially in Seattle and King County, Washington, a quality and kind of gasoline known as "Green Streak" gasoline, which said gasoline the defendant proceeded to market generally and sell to the dealer trade in Seattle and King County, Washington; that in direct breach and violation of the provisions of its said contract, and with full knowledge that the complainant was under contractural obligation with a large number of service station dealers to furnish said gasoline to said stations, defendant knowingly and wilfully refused to sell to complainant any of said Green Streak gasoline; that although the complainant repeatedly demanded from the duly authorized officers of the defendant company in charge of the Seattle office that the contract be

complied with in this respect, the said officers failed and refused so to do.

X.

That immediately upon receiving information that the Shell Oil Company would not comply with the terms of its said contract with complainant and sell it Green Streak gasoline, the [26] representatives of the complainant company made diligent efforts to purchase gasoline of a similar quality from the major oil companies, but were unsuccessful as none of them would sell gasoline to the complainant.

XI.

That the defendant, with the exception of a period of time that it was directed to sell complainant Green Streak gasoline by mandatory injunction, to-wit, from on or about July 15, 1932, to August 1, 1932, has failed to furnish complainant with any Green Streak gasoline and is now failing and refusing to furnish said gasoline; that defendant's representatives have advised complainant that they will continue to refuse to sell complainant any of said Green Streak gasoline; that since the dissolution of the said mandatory injunction on August 1, 1932, complainant again made diligent effort to purchase gasoline of a quality and structure similar to Green Streak from major oil companies, all without success; that complainant has been unable to pur-

chase gasoline anywhere of a quality and structure similar to that of Green Streak gasoline.

XII.

That as a result of the defendant's deliberate violation of the terms of its said contract with complainant and its refusal to furnish complainant with the same quality of gasoline that it is selling generally to the dealer trade in Seattle, King County, Washington, to-wit, Green Streak gasoline, complainant has sustained serious and irreparable injury; that with certain exceptions hereinafter more particularly set forth in paragraph XIII hereof, complainant has no way of being adequately compensated for damages on account of said injuries; that it has [27] no speedy and adequate remedy at law; that unless mandatory injunctive relief as herein requested is granted at the hearing of this cause on September 6, 1932, complainant will be forced out of business, because it is not financially able to continue to suffer the loss it is sustaining from day to day and as more particularly set forth in said paragraph XIII hereof; that in addition thereto, complainant has been threatened with and will be obliged to defend a multiplicity of lawsuits brought against it by its dealers, in the event it does not succeed in securing the relief prayed for.

XIII.

That there are certain damages which plaintiff has sustained and is sustaining which can be computed definitely and, in order to avoid the necessity of commencing an additional suit, complainant asks that such damages as can be fixed be determined and settled in this case; that said damages as can be reasonably ascertained at this time are as follows:

(1) The outright loss of service station dealer accounts and business as a result of complainant's inability to furnish Green Streak gasoline to said dealers; that a list of the gasoline service stations actually lost to date is annexed hereto, marked Exhibit "C", and by reference made a part hereof.

(2) In an effort to maintain and save as much of its business as possible until it is able to secure the relief sought, complainant is selling Shell 3-Energy Gasoline to certain dealers at the reduced price at which Green Streak gasoline is being sold by the defendant company; that in this connection complainant's damage is the difference between the wholesale price of Shell 3-Energy gasoline and Green Streak gasoline which said scale fluctuates from time to time. [28]

XIV.

That the injury and loss suffered and to be suffered by the complainant as outlined in the preceding paragraph is of a continuing nature and will

continue as hereinabove stated until specific performance and injunctive relief as requested is granted at the trial of this said cause on or about September 6, 1932; that complainant requests that a complete hearing on the question of its said damages that can be ascertained, be had at the trial herein on September 6, 1932, or as soon thereafter as the same may be heard, and that the above entitled court, or any referee assigned to hear the said cause after the said hearing, fix and determine the exact amount of damages complainant has sustained and will have sustained up to and including the time that it received the injunctive relief requested.

WHEREFORE, complainant prays that it may have judgment against the defendant as follows:

First. For a mandatory injunction requiring the defendant to specifically perform the terms of its said contract of November 25, 1929, with complainant; that the said defendant be directed to furnish complainant with Green Streak gasoline in accordance with the terms of said contract for the remaining period thereof, to-wit, until February 28, 1933.

Second. That the amount of damages which the complainant has and will sustain by virtue of the defendant's breach of said contract up to and including on or about September 6, 1932, be determined by the court, and the defendant directed to pay the same to complainant.

Third. For its costs and disbursements herein to be taxed.

Fourth. For such other, further and different relief [29] as to this Honorable Court may seem just and equitable in the premises.

PEYSER AND BAILEY,
Attorneys for Complainant.

State of Washington,
County of King.—ss.

Phil L. Polsky, being first duly sworn, on oath deposes and says: that he is the president of the above complainant; that as such he is authorized so to do and makes this verification for and in behalf of said company; that he has read the within and foregoing amended bill of equity, knows the contents thereof, and believes the same to be true.

PHIL L. POLSKY.

Subscribed and sworn to before me this 26th day of August, 1932.

[Seal] JAMES M. BAILEY,
Notary Public in and for the State of Washington, residing at Seattle.

Copy rec'd 8/27/32. Hyland, Elvidge & Alvord, Attorneys for Defendant. [30]

EXHIBIT "B"

Name.	Address.
Bartley & Elosson,	900 Rainier Avenue.
S. L. Batchelor,	2325 West Spokane St.
Beacon Hill Service Station,	2531 Beacon Avenue.
Ben's Service Station,	25th & East Cherry St.
H. D. Bigelow,	2615 Stoneway.
M. Black,	4135 Wallingford.
W. C. Bouton,	9th & Olive Way.
Bridges Service Station,	65th & 10th N. E.
Frank Buckley,	4700 - 10th N. E.
A. D. Carpenter,	304 North 36th.
L. Diamond,	2010 Western Avenue.
A. K. Decker,	7th & Olive Way.
Joe Deschenes,	21st South & Rainier.
Paul Engel,	316 Florentia St.
Dave Ferguson,	2001 E. Union St.
Fifth Avenue Garage,	2401 - 5th Ave.
L. J. Geck,	1450 West 48th St.
Gilman Avenue Service Station,	2552 - 15th Ave. West.
I. Goldberg,	3200 Beacon Ave.
E. F. Gray & Sons,	6256 - 35th Ave. N. E.
Gray Line Transportation Co.,	1320 - 13th Ave.
Greyhound Service Station,	8th & University St.
A. P. Grumbach,	7201 Woodland Park Ave.
Hampson-Harris,	14th & East Union.
Alex Hergert,	Everett Highway.
M. Jacquot,	E. 110th and 10th N. E.
V. Johnson,	15th N. W. and W. 65th.
Ben Kozicki,	RFD. No. 2, Kirkland, Wash.

Name.	Address.
H. M. Kearney,	1st South & E. Marginal.
E. E. Kohl,	1203 Railroad Avenue.
E. Kosokoff,	27th & East Cherry.
John Mattila,	RFD. Bothel.
C. S. McGregor,	Route 1, Edmonds.
Fred Moore,	1413 - 7th Ave.
Wm. Morgan,	8700 Greenwood Ave.
Motor-in-Markets,	Queen Anne & Republic.
H. M. Peters,	Sunnyvale, Wash.
Pike Auto Park,	1907 Market Place.
President Garage,	2014 Second Avenue.
S. C. Robison,	17260 Aurora Avenue.
Roosevelt Service Station,	6800 - 10th Ave. N. E.
Jack Ross,	2121 Western Avenue.
Salmon Bay Service Station,	3639 - 15th Ave. W.
Fred Shafer,	2312 First Ave.
Serles Brothers,	4450 Fauntleroy.
C. H. Sherman,	1313 Jackson St.
N. C. Smith,	7190 California Ave.
H. G. Seth,	5400 Leary Way.
Smith Tower Garage,	2nd & Yesler.
P. C. Trotter,	26th & Jackson St.
Leo. Wittenberg,	9875 - 16th S. W.
Sam Wittenberg,	5th and Denny Way.
C. Wolf,	2611 E. 55th St.
Lunghard and Seward,	5200 - 10th N. E.
Fred Tamke,	4800 - 8th Ave. South.
Levine & Watkins,	1562 - 4th Ave South.
John A. Bussear,	1700 Airport Way. [31]

EXHIBIT "C"

Name.	Address.	June Gallonage.
M. E. Batchelor,	4559 California Avenue,	4610
Echo Lake Service Station,	Richmond Highlands,	700
H. D. Frazelle,	9300 Purcell Avenue,	375
A. D. Guertin,	4072 Rainier Avenue,	2330
A. J. Jakeway,	13th So. & Bailey St.	5972
W. D. Monk,	5th N. E. and E. 65th,	2380
Jack Ross,	2121 Western Avenue,	3410
Art Payne,	7701 - 9th Ave. S. W.	1350

[Endorsed]: Filed Aug. 27, 1932. Ed. M. Lakin, Clerk. [32]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for answer to the amended bill of the plaintiff states, as follows, to-wit:

I.

Touching the allegations contained in paragraph V thereof, admits that on the 25th day of November, 1929, the parties hereto entered into a certain contract in writing, which contract contains the quoted portions set out in paragraph V of said amended bill, but denies each and all of the rest of the allegations in said paragraph contained.

II.

Touching the allegations contained in paragraph VI, denies the same and each and all the whole thereof.

III.

Touching the allegations contained in paragraph, VII, denies the same and each and all the whole thereof.

IV.

Touching the allegations contained in paragraph IX, admits that the defendant has refused to sell to the plaintiff, "Green Streak" gasoline, but denies each and all the rest of the allegations in said paragraph contained.

V.

Touching the allegations contained in paragraph X, denies the same and each and all the whole thereof.

VI.

Touching the allegations contained in paragraph XI, admits that with the exception of the period of time that it was directed so to do by a mandatory injunction, this defendant has refused to furnish plaintiff with "Green Streak" gasoline, but denies each and all of the rest of the allegations in said paragraph contained. [33]

VII.

Touching the allegations contained in paragraph XII, denies the same and each and all the whole thereof, and specifically denies that the plaintiff has sustained any injury, and specifically denies that the plaintiff has sustained any damages and specifically denies that it has been threatened with, or will be obliged to defend any law suits, and specifically denies that it is entitled to any injunctive relief.

VIII.

Touching the allegations contained in paragraph XIII, denies the same and each and all the whole thereof, and specifically denies that the plaintiff has lost any business by reason of its inability to obtain "Green Streak" gasoline, and specifically denies that it has lost any gasoline service stations, and specifically denies that it has sustained any damage.

IX.

Touching the allegations contained in paragraph XIV, denies the same and each and all the whole thereof, and specifically denies that the plaintiff has sustained any damages whatever and specifically denies that the plaintiff is entitled to any injunctive relief whatever.

For a first, further and affirmative defense to the complaint of the plaintiff, this defendant alleges, as follows, to-wit:

I.

That the plaintiff is in default under the terms of the contract referred to in paragraph V of the amended bill in the following particular to-wit: in that the said contract provides that "All gasoline is to be paid for in cash at the time of delivery". The plaintiff has failed and refused to comply with the said provision and has taken delivery of gasoline for which it has not paid, in the sum of $47,392.90, in which amount the plaintiff is indebted [34] to the defendant by reason of facts, matters and things arising out of the contract sued upon in this case.

WHEREFORE defendant prays that the bill of the plaintiff be dismissed and that the defendant have its costs.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendant.

State of Washington,
County of King.—ss.

D. G. Fisher, being first duly sworn, on oath deposes and says: that he is the Division Manager of Shell Oil Company, a corporation, defendant above named, and makes this verification for and on its behalf, and is authorized so to do; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

D. G. FISHER,

Subscribed and sworn to before me this 30th day of August, 1932.

[Seal] JOHN ADEMINO, JR.
Notary Public in and for the State of Washington residing at Seattle.

Received Aug. 31, 1932. Peyser & Bailey, By AD, Seattle, Wash.

[Endorsed]: Filed Aug. 31, 1932. Ed. M. Lakin, Clerk. [35]

[Title of Court and Cause.]

REPLY.

Comes now the INDEPENDENT PETROLEUM COMPANY, complainant herein, and replies to the defendant's affirmative defense set forth in its answer, as follows:

Complainant admits that the contract therein referred to contains the following provision: "All gasoline is to be paid for in cash at the time of delivery", but denies each and every other allegation in said answer contained; and specifically denies that it is indebted to the defendant in the sum of $47,392.90, and further denies that it has violated any provision of its said contract with defendant.

PEYSER & BAILEY,
Attorneys for Complainant.

State of Washington,
County of King.—ss.

Phil L. Polsky, being first duly sworn, on oath deposes and says: That he is the president of the Independent Petroleum Company, complainant herein; that as such he is authorized so to do and makes this verification for and in behalf of said complainant; that he has read the within and foregoing reply, knows the contents thereof and believes the same to be true.

PHIL L. POLSKY.

Subscribed and sworn to before me this 6th day of September, 1932.

[Seal] JAMES M. BAILEY,
Notary Public in and for the State of Washington, residing at Seattle.

Copy Rec'd 9/6/32. Hyland, Elvidge & Alvord.

[Endorsed]: Filed Sep. 6, 1932. Ed. M. Lakin, Clerk. [36]

[Title of Court and Cause.]

TRIAL, Record of.

Now on this 6th day of September, 1932, this cause is called for trial with Peyser & Bailey appearing as counsel for the complainant, and Hyland, Elvidge & Alvord appearing for the defendant. Opening statements are made by counsel for both sides. Witnesses are sworn and examined for the

complainant as follows: Phil L. Polsky and John P. Murray. The complainants exhibits number 1, 4, and 5 are admitted in evidence. Exhibits numbered 2 and 3 are withdrawn. Recess is had until 2 P. M., at which time the trial is resumed with Witness Murray again on the witness stand. The complainant presents to the court its proposed findings, conclusions, and decree. Witness Polsky is recalled by the defendant for further cross-examination by leave of court. Witnesses for the complainant are sworn and examined as follows: H. F. Rippe, E. W. Dietz, Jack Kingsley, James Gron, Thomas Blaker, H. W. McCreery, S. L. Mouat, Fred Call, H. G. Ross, Fred Saxe, D. Hughes, Dick Smith, W. D. Monk, Wm. Giddings, Ed. Thorne, A. L. Sheltraw, M. P. Clausen, F. W. Schroeder, A. Bendsen, Witness Polsky. The complainant's exhibits numbered 6, 7, and 8 are admitted in evidence. Exhibit numbered 9 is not offered and is withdrawn. The complainant rests. Witnesses for the defendant are sworn and examined as follows: Alfred George Marshall, Paul E. Lakin, Donald G. Fisher, E. L. Miller, A. C. Guske, Witness Lakin recalled for further cross-examination. The defendant's exhibit numbered A is offered and ruling reserved. The plaintiff's exhibit numbered 10 is admitted in evidence. The defendant rests. The complainant rests. Argument of counsel is continued over until 10 A. M. tomorrow.

Equity Journal No. 2, at page 629. [37]

[Title of Court and Cause.]

TRIAL RESUMED.

Now on this 7th day of September, 1932, Peyser & Bailey appearing as counsel for the complainant and Hyland, Elvidge & Alvord appearing for the defendant, trial of the above entitled cause is resumed, arguments of counsel are heard, and ruling from the bench by the court is made in favor of the plaintiff. Said cause is continued until 10 A. M. tomorrow for entry of a decree. Exception is noted by the defendant.

Equity Journal No. 2, at page 630. [38]

In the United States District Court for the Western District of Washington, Northern Division.

No. 944

INDEPENDENT PETROLEUM COMPANY,
Plaintiff,

vs.

SHELL OIL COMPANY, INCORPORATED,
Defendant.

DECISION OF THE COURT.
September 7, 1932.

NETERER, District Judge:

From choice I would prefer to take this matter under advisement and render a formal opinion. In view of the disclosed circumstances and the issue

involved, being largely a question of fact as well as construction of this contract, I feel that aside from authorities to support my view that I am as well prepared to dispose of this now as at any time.

The contract in issue entered into on the 25th day of November, 1921, was obviously a contract whereby the Shell Oil Company secured the agency of the Independent Petroleum Company as an agency for the distribution of its products within the territory described in the contract, and to supply to its distributing agent or agency its motor vehicle product, of which it made just one grade,—I think it is denominated "400". The provision of this contract which is in issue and controls: "It is mutually understood and agreed that gasoline as so bought from the Shell Company by said Petroleum Company is to be Shell gasoline of the quality the Shell Company is at the time of delivery selling to its dealer trade generally in Seattle, Washington. It being [39] understood that the word 'gasoline' as used throughout this contract shall be construed to mean gasoline of a character ordinarily sold by Shell Company to its service station operators for motor vehicle operation, and shall exclude all special refined or blended gasolines sold by it for special purposes at an increased price or prices."

It appears that following the execution of this contract the gasoline then produced and distributed was supplied to the Independent Company, plaintiff in this case, in harmony with the provision of the

contract, and thereafter Super Shell was evolved, then Shell Ethyl, and the 3-Energy Shell, and Greenstreak. I think it is obvious from this contract that plaintiff was not entitled to the Super Shell, nor the Shell Ethyl, nor the 3-Energy, especially the Shell Ethyl, for the reason that the Shell Ethyl was not a product of the defendant in this case, but was delivered to its trade by franchise from the owners of the Ethyl product.

It is in evidence, on behalf of the witnesses of the defendant, and whom I think knew that they were talking about, that the change from the Shell 400 was made to the Super Shell when they felt that a new name should be supplied. I think Shell 3-Energy, likewise, superseded the Super Shell when they felt that that name had worn out its usefulness. And upon inquiry from the court whether the names were changed so that the prices could be raised, stated, "Possibly" or words to that effect.

I concluded from the testimony that the several grades enumerated, the Super Shell, the Shell Ethyl, the 3-Energy and the 400 were practically the same. The Green Streak was evolved for the purpose of meeting competition. Other companies had placed a cheap gasoline upon the market, and it is testified by the witnesses for the defendant that it was necessary in the trade to meet [40] this competition.

The difference between the Green Streak and the better quality is that the Green Streak has the quality to knock, while the better quality or grade,

the quality to push, but they are all furnished for the same purpose. I believe, and I should say in this connection, that from the evidence I am convinced beyond any question of doubt that the Green Streak was supplied to the trade, in so far as demand was made, except as to the plaintiff here, and persons likely situated.

There is no evidence that any applications for Green Streak were denied. There is evidence that before Green Streak was furnished to some of the distributors who had contracts, that the defendant company required the dealer to sign a contract agreeing that this may be withdrawn at any time. This the defendant could have done without any contract, provided it had withdrawn it from the trade.

There is nothing in the contract which required it to produce this gasoline or required it to continue delivery, if it ceased to produce it, because the limitation is upon the quality at the time of delivery, so that the waiver of contract upon the issue in this case is entirely immaterial, and, I think, that practically disposes of your suggestion upon the trial as to its introduction.

I also believe that, applying the doctrine of ejusdem generis to the construction of this contract, that the parties themselves have defined the meaning of the word "general" and the gasoline that was to be delivered. Under the rule of ejusdem generis,

where general terms precede specific designations, the specific designation or description controls.

We have then, in the second paragraph, which I have [41] read: "It being further understood that the word 'gasoline' as used throughout this contract, shall be construed to mean gasoline of a character ordinarily sold by Shell Company to service station operators for motor vehicle operation." And this, then, is the exception: "Exclude all special refined or blended gasoline sold by it for special purposes at an increased price or prices."

That sentence or phrase controls the entire meaning of the contract as to the gasoline to be delivered, and when the gasoline for motor vehicle operation of the better quality was delivered,—and the only quality then dealt in by the defendant,—they afterwards made another quality for the same use in operation of the same motor vehicles, of a less price, —it was required under the terms of the contract to deliver it. And I think, likewise, as I intimated a moment ago, that aside from this construction, which I think is controlling, that this gasoline was furnished and sold to the general trade that asked for it.

The Shell Company, Inc., is a distinct entity, and while it is controlled and owned by the Shell Company for the purpose of distribution of its products, it was organized and the Green Streak was furnished to it, and furnishing it to the Shell Company,

Inc., in law, would be the same as delivering it to any other third person, because the Shell Company, Inc., is a distinct entity, controlled, however, and owned, as it was, by the Shell Company.

I am convinced beyond any question of doubt in this case from the evidence and the examination of this contract, that that was the intent of the parties at all times, and at the time of the execution of he contract.

It is true that some language is employed there that was not necessary, but the employed language is specific, and controls. [42]

The evidence shows that the plaintiff company was organized for the purpose of making this distribution, and that it has built a large distributing agency. Aside from the testimony of the president of the company, the first witness, that large sums of money have been expended and business has been developed, the testimony of the defendant witnesses was that he was selling too much gasoline, and that by continuing at the same rate of sale, from 350,000 to 400,000 gallons a month, his supply would be exhausted in two months. And to build up a business of that type, the court must judicially know, requires an expenditure of money, application of energy, and the construction of an organization which cannot be built up in a day, and which is of great value.

It is likewise in evidence, and I think the conclusion is reasonable, that in order to compete in the market in the sale of gasoline with the concerns that sell the cheaper gasoline and to meet which competition this gasoline was produced, that it is necessary to have this gasoline.

It is in evidence that the plaintiff has entered into a contract with several distributing agencies, to whom it is agreed to supply gasoline, and that it is unable to have these contracts renewed, for the reason that it cannot agree, under the present conditions, to supply the cheaper grade, and they are, therefore, losing a part of their customers, which of course depletes the corporate construction of the distribution agency.

It is likewise in evidence, and it is not disputed, that the plaintiff has been selling the higher priced gasoline at the low price for the purpose of retaining its trade, and that it has practically exhausted its resources, and I believe from the testimony, that it would have to cease operation within two or three weeks. [43]

It is likewise in evidence, and it is not disputed, that under the terms and provisions of this contract, the plaintiff has received during the entire period the Super gas, and likewise the 3-Energy gas, and likewise,—although some difficulty was experienced by the defendant in obtaining their franchises to sell Ethyl gasoline, because it did not desire it to

be delivered to independent operators; yet this was furnished by the defendant to the plaintiff for sale.

The court is not impressed with the thought that the non-delivery of this gasoline to the plaintiff was for the purpose of protecting its trade name in the distribution of quality gasoline produced by it. If that was the thought in mind of the defendant, it would not have made the product, but it was made for that specific purpose.

I don't believe that the plaintiff has an adequate and speedy remedy at law. I believe it would be practically impossible to measure the damages which would be sustained by the plaintiff, should the court relegate him to his legal remedy—an action at law. I believe from the evidence presented that what this court said in the Pacific Telephone and Telegraph Company against the City of Seattle has application, and I think that the status and relation of these parties, the peculiar relation in which the plaintiff is placed with relation to the trade and to the public, his contractual relation to agents and his inability to meet requirements which the trade demands with relation to the cheaper gasoline, are such that the legal remedy is not adequate, and is not speedy. Nor do I think that the mere fact that the plaintiff is entitled to only 800,000 gallons of gasoline and that this could be delivered within two months, should have any weight with the court. The issue now is acute, the plaintiff has [44] a right, of which he is deprived, and I think the defendant

should be required to specifically perform, and a decree accordingly will follow.

I do not think that the other case referred to in this jurisdiction with relation to the delivery of oysters of special grades, quantities, and qualities, and various times, and ways, has any application here. This case requires no supervision. The only requirement will be that this gasoline be delivered upon payment therefor. That is all that there is to it. And when the 800,000 gallons are delivered, the obligation is complete.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [45]

[Title of Court and Cause.]

DEFENDANTS PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW.

Comes now the defendant above named and requests the court to enter the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT.

I.

That the defendant is in the business of selling and distributing gasoline and other petroleum products on the Pacific Coast.

II.

That on the 25th day of November, 1929, a contract in writing was entered into by and between the parties hereto, which contract has been admitted in evidence in this case, which contains the following provisions, to-wit:

"The Petroleum Company agrees to buy from the Shell Company and the Shell Company agrees to sell to the Petroleum Company, on the terms and in the manner hereinafter set forth, all the gasoline for use and resale in the City of Seattle and its immediate and adjacent suburbs, which the Petroleum Company requires and deals in, said quantity not to be less than 1,200,000 gallons, nor more than 4,000,000 gallons in any one year, reckoning from December 15, 1929, and not less than 100,000 gallons, nor more than 400,000 gallons for any one month, reckoning from December 15, 1929, said quantities to be bought, received and paid for by the Petroleum Company in a month or year as the case may be. [46]

"It is mutually understood and agreed that gasoline so bought from said Shell Company by said Petroleum Company is to be Shell gasoline of the quality the Shell Company is at the time of delivery selling to its dealer trade generally in Seattle, Washington.

"It being further understood that the word 'Gasoline' as used throughout this contract shall be con-

strued to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude all special refined or blended gasolines sold by it for special purposes at an increased price or prices."

III.

That at the time the complainant and defendant entered into said contract, the defendant was selling to the dealer trade generally in Seattle, Washington, a brand of gasoline known as "Shell 400 Dry"; that thereafter the defendant placed on the market and sold generally to the dealer trade and to the complainant herein substantially the same brand of gasoline under the name of "Shell 3-Energy", which gas the defendant sold and delivered to the plaintiff pursuant to the above mentioned contract; that approximately eight or ten months after the execution of the contract, the defendant placed on the market and sold and delivered to its dealer trade generally in Seattle, Washington, a specially refined or blended gasoline manufactured for special purposes which was sold at an increased price over that known as "Shell 3-Energy", and known as "Super-Shell", and did decline by reason of the provisions of the aforesaid contract to deliver and sell the said brand of gasoline to the plaintiff, but shortly thereafter did, by reason of an oral modification of the contract in that regard, and despite the terms of the contract, deliver and sell the said spe-

cially blended gasoline to the plaintiff; that thereafter and during the fore part of the year 1932, the defendant commenced to market and distribute generally to its dealer trade in Seattle, Washington, substantially the same grade or quality of gasoline known as "Shell 400 Dry", under a new and different advertising name or brand known [47] as "Shell 3-Energy", and is continuing so to do; that during the year 1931, the defendant ceased to market and sell generally to its dealer trade in Seattle, Washington, and elsewhere that specially blended grade or brand of gasoline known as "Super-Shell" and in lieu thereof did market and distribute and sell generally to its dealer trade in Seattle, Washington, and elsewhere a specially refined or blended gasoline known as "Shell-Ethyl", which said product known as "Shell Ethyl" was marketed by the Shell Oil Company under a special license from the holders of the patent rights for the manufacture of said "Shell Ethyl", which patent rights prohibit the defendant from selling the said brand known as "Shell Ethyl" to jobbers such as the plaintiff above named, and at the time of the commencement of marketing by defendant of said specially blended product as aforesaid, the defendant did decline to deliver the same to the plaintiff by reason of the aforesaid provisions of the contract, but shortly thereafter, despite the contract, and by reason of oral modification thereof in that regard, and despite the inhibition of said license, did sell and deliver

the same to the plaintiff; and at all times the said "Super-Shell" and said "Shell Ethyl" were sold and delivered to the plaintiff, the plaintiff knew that it was not entitled to receive same under the terms of the aforesaid contract.

IV.

That the defendant has spent many thousands of dollars in promoting and advertising the product known as "Shell 3-Energy" and in developing it to a point where there was and is now a great demand therefor, which said product is a brand of gasoline which meets substantially all the requirements of motor-operated vehicles.

V.

That on or about July 1, 1932, the defendant manufactured a grade of gasoline cheaper and inferior than and to the brand of [48] gasoline known as "Shell 3-Energy", which said cheap and inferior grade of gasoline was and is known as "Green Streak"; that the said brand of gasoline was manufactured for a special purpose, to-wit, to meet the competition of other gasolines sold at a cheaper price than the brand of gasoline sold under the name of "Shell 3-Energy" and gasolines of other gasoline companies sold at approximately the same price as "Shell 3-Energy"; that defendant did not market and distribute, and is not marketing and distributing, the same generally to its dealer trade

in Seattle, Washington, nor on the Pacific Coast, nor was it, nor is it, of the character ordinarily sold by defendant to service station operators for motor vehicle operation in Seattle, Washington, or on the Pacific Coast; that the defendant, at the time of the trial of the above entitled cause, had in the City of Seattle approximately forty-eight (48) split pump dealers, otherwise known as dealers who handle petroleum products including gasoline of other oil companies, to which the defendant has refused, and continues to refuse, to sell the said "Green Streak" gasoline, and the said split pump dealers cannot procure the same from the defendant; that the defendant had, at the time of the trial of the above entitled cause, approximately one hundred twenty-two (122) dealers in the City of Seattle handling Shell products exclusively known as 100% dealers, to only forty-eight (48) of whom the Shell Oil Company sold and delivered "Green Streak" gasoline, and refused to sell and deliver the same to any of the other exclusive or 100% dealers, and the said other exclusive and 100% dealers could not procure the same from the Shell Oil Company; that before the Shell Oil Company would sell the said "Green Streak" gasoline to said exclusive or 100% dealers, the defendant did require the said dealers to sign an acknowledgment, if the said dealers were buying gasoline from the defendant by contract, that, (1) If any "Green Streak" gasoline [49] were delivered to them, it should be deemed to have been delivered

to them in pursuance of the contract between the dealer and the defendant; (2) That the dealer would pay cash therefor on delivery; (3) That the defendant might decline to deliver any of said gasoline at any time; and (4) That the said delivery of "Green Streak" gasoline should not be taken into consideration in computing the amount of any rental or other periodical payment payable under the contract in effect between the defendant and such dealer; that, at the time of the trial of the above entitled cause, the defendant sold gasoline to persons or gasoline vendors having a single pump on their premises for the dispensing of gasoline, but refused to deliver to the same any "Green Streak" gasoline, and the said single pump persons or dealers could not procure the same from the defendant.

VI.

That the defendant has refused to deliver the said "Green Streak" gasoline to the plaintiff, and, in so doing, the defendant has acted pursuant to the terms of the above mentioned contract between the defendant and the plaintiff, and, in so doing, did not commit a breach of the above mentioned contract between the defendant and the plaintiff.

VII.

That for the purpose of protecting the trade name, reputation, standing, and marketability of the product known as "Shell 3-Energy", the defendant

has refused to sell "Green Streak" gasoline under any circumstances to, or permit the same to be obtained by, any person or operator or dealer who might sell the same under the name of "Shell 3-Energy" gasoline, or in any other way permit it to be advertised or delivered so as to prejudice the trade name, standing, and marketability of said "Shell 3-Energy" gasoline. [50]

VIII.

That it is not necessary for a service station operator or dealer to have for the purposes of sale "Green Streak" gasoline in order to successfully compete or meet the competition of other dealers or of other grades of gasoline.

IX.

That by reason of the inability of the plaintiff to procure and purchase "Green Streak" gasoline from the defendant, the plaintiff has not lost any business nor suffered any damage and will not lose any business or suffer any damage as a consequence thereof.

X.

That the said contract of November 25, 1929, contains also the following clause:

"It is mutually understood and agreed that either the Shell Company or the Petroleum Company may terminate and cancel this contract on twelve

months' notice to the other party, provided said notice may not be given prior to November 30th, 1930,"

and pursuant to said provision of said contract, the defendant did, on or about the 28th day of February, 1932, serve a twelve-months' notice of cancellation upon the plaintiff, and the said contract, by reason thereof, will terminate on the 28th day of February, 1933.

XI.

That the plaintiff has purchased from the defendant at the date hereof approximately 3,200,000 gallons of gasoline, and there remain to be delivered to and purchased by the plaintiff under said contract approximately 800,000 gallons of gasoline under the maximum clause of 4,000,000 up to and including the 15th day of December, 1932, and, pursuant to the terms of the contract, the defendant will not be required to deliver to the plaintiff any more than a total of 400,000 gallons between December 15, 1931, and December 15, 1932, or an approximate balance thereof in the [51] sum of 800,000 gallons between the date hereof and the 15th day of December, 1932.

Done in open Court this ..... day of September, 1932.

.....

Judge.

From the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW.

I.

That the defendant has not violated any of the provisions of its contract with the plaintiff herein.

II.

That the plaintiff has not sustained any damage by reason of anything done by the defendant in the performance of the contract herein.

III.

That no emergency exists and the plaintiff is not entitled to any injunctive relief directing specific performance of the contract or for any purpose.

Done in open Court this ..... day of September, 1932.

.....

Judge. [52]

Service of original by receipt of copy admitted this 8 day of Sept., 1932. Peyser & Bailey.

The foregoing findings, except 1, 2, and 11 and all conclusions presented to the Court by deft. are refused this 8th day of September, 1932. Findings 1, 2, and 11 may be considered as findings of the Court in addition to the findings in the decision of the Court at the conclusion of the trial which de-

cision has been extended by the reporter and are filed in this case.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [53]

[Title of Court and Cause.]

EXCEPTIONS TO REFUSAL TO MAKE FINDINGS.

Defendant excepts to the refusal of the court to make finding of fact No. III proposed by the defendant, reading as follows, to-wit:

> That at the time the complainant and defendant entered into said contract, the defendant was selling to the dealer trade generally in Seattle, Washington, a brand of gasoline known as "Shell 400 Dry"; that thereafter the defendant placed on the market and sold generally to the dealer trade and to the complainant herein substantially the same brand of gasoline under the name of "Shell 3-energy", which gas the defendant sold and delivered to the plaintiff pursuant to the above mentioned contract; that approximately eight or ten months after the execution of the contract, the defendant placed on the market and sold and delivered to its dealer trade generally in Seattle, Washington, a specially refined or blended gasoline manu-

factured for special purposes which was sold at an increased price over that known as "Shell 3-energy," and known as "Super-Shell," and did decline, by reason of the provisions of the aforesaid contract to deliver and sell the said brand of gasoline to the plaintiff, but shortly thereafter did, by reason of an oral modification of the contract in that regard, and despite the terms of the contract, deliver and sell the said specially blended gasoline to the plaintiff; that thereafter and during the fore part of the year 1932, the defendant commenced to market and distribute generally to its dealer trade in Seattle, Washington, substantially the same grade or quality of gasoline known as "Shell 400 Dry," under a new and different advertising name or brand known as "Shell 3-energy," and is continuing so to do; that during the year 1931, the defendant ceased to market and sell generally to its dealer trade in Seattle, Washington, and elsewhere that specially blended grade or brand of gasoline known as "Super-Shell" and in lieu thereof did market and distribute and sell [54] generally to its dealer trade in Seattle, Washington, and elsewhere a specially refined or blended gasoline known as "Shell-Ethyl," which said product known as "Shell-Ethyl" was marketed by the Shell Oil Company under a special license from the holders of the patent rights for the manufacture of

said "Shell Ethyl," which patent rights prohibit the defendant from selling the said brand known as "Shell Ethyl" to jobbers such as the plaintiff above named, and at the time of the commencement of marketing by defendant of said specially blended product as aforesaid, the defendant did decline to deliver the same to the plaintiff by reason of the aforesaid provisions of the contract, but shortly thereafter, despite the contract, and by reason of oral modification thereof in that regard, and despite the inhibition of said license, did sell and deliver the same to the plaintiff; and at all times the said "Super-Shell" and said "Shell Ethyl" were sold and delivered to the plaintiff, the plaintiff knew that it was not entitled to receive same under the terms of the aforesaid contract,

on the ground and for the reason that the evidence supports the said finding.

Defendant excepts to the refusal of the court to make finding of fact No. IV proposed by the defendant, reading as follows, to-wit:

That the defendant has spent many thousands of dollars in promoting and advertising the product known as "Shell 3-energy" and in developing it to a point where there was and is now a great demand therefor, which said product is a brand of gasoline which meets substantially all the requirements of motor-operated vehicles,

on the ground and for the reason that the evidence supports the said finding.

Defendant excepts to the refusal of the Court to make finding of fact No. V proposed by the defendant, reading as follows, to-wit:

> That on or about July 1, 1932, the defendant manufactured a grade of gasoline cheaper and inferior than and to the brand of gasoline known as "Shell 3-energy," which said cheap and inferior grade of gasoline was and is known as "Green Streak"; that the said brand of gasoline was manufactured for a special purpose, to-wit: to meet the competition of other gasolines sold at a cheaper price than the brand of gasoline sold under the name of "Shell 3-energy" and gasolines of other gasoline companies sold at approximately the same price as "Shell [55] 3-energy"; that defendant did not market and distribute, and is not marketing and distributing, the same generally to its dealer trade in Seattle, Washington, nor on the Pacific Coast, nor was it, nor is it, of the character ordinarily sold by defendant to service station operators for motor vehicle operation in Seattle, Washington, or on the Pacific Coast; that the defendant, at the time of the trial of the above entitled cause, had in the City of Seattle approximately forty-eight (48) split pump dealers, otherwise known as dealers who handle petroleum products including gasoline of other

oil companies, to which the defendant has refused, and continues to refuse, to sell the said "Green Streak" gasoline, and the said split pump dealers cannot procure the same from the defendant; that the defendant had, at the time of the trial of the above entitled cause, approximately one hundred twenty-two (122) dealers in the City of Seattle handling Shell products exclusively known as 100% dealers, to only forty-eight (48) of whom the Shell Oil Company sold and delivered "Green Streak" gasoline, and refused to sell and deliver the same to any of the other exclusive or 100% dealers, and the said other exclusive and 100% dealers could not procure the same from the Shell Oil Company; that before the Shell Oil Company would sell the said "Green Streak" gasoline to said exclusive or 100% dealers, the defendant did require the said dealers to sign an acknowledgment, if the said dealers were buying gasoline from the defendant by contract, that, (1) If any "Green Streak" gasoline were delivered to them, it should be deemed to have been delivered to them in pursuance of the contract between the dealer and the defendant; (2) That the dealer would pay cash thereof on delivery; (3) That the defendant might decline to deliver any of said gasoline at any time; and (4) That the said delivery of "Green Streak" gasoline should not be taken into consideration in com-

> puting the amount of any rental or other periodical payment payable under the contract in effect between the defendant and such dealer; that, at the time of the trial of the above entitled cause, the defendant sold gasoline to persons or gasoline vendors having a single pump on their premises for the dispensing of gasoline, but refused to deliver to the same any "Green Streak" gasoline, and the said single pump persons or dealers could not procure the same from the defendant,

on the ground and for the reason that the evidence supports the said finding.

Defendant excepts to the refusal of the Court to make finding of fact No. VI proposed by the defendant, reading as follows, to-wit:

> That the defendant has refused to deliver the said "Green Streak" gasoline to the plaintiff, and, in so doing, the defendant has acted pursuant to the terms of the above mentioned contract between the defendant and the plaintiff, and, in so doing, did not commit a breach of the above mentioned contract between the defendant and the plaintiff, [56]

on the ground and for the reason that the evidence supports the said finding.

Defendant excepts to the refusal of the Court to make finding of fact No. VII proposed by the defendant, reading as follows, to-wit:

> That for the purpose of protecting the trade name, reputation, standing, and marketability of the product known as "Shell 3-energy", the defendant has refused to sell "Green Streak" gasoline under any circumstances to, or permit the same to be obtained by, any person or operator or dealer who might sell the same under the name of "Shell 3-energy" gasoline, or in any other way permit it to be advertised or delivered so as to prejudice the trade name, standing, and marketability of said "Shell 3-energy" gasoline,

on the ground and for the reason that the evidence supports the said finding.

Defendant excepts to the refusal of the Court to make finding of fact No. VIII proposed by the defendant, reading as follows, to-wit:

> That it is not necessary for a service station operator or dealer to have for the purpose of sale "Green Streak" gasoline in order to successfully compete or meet the competition of other dealers or of other grades of gasoline,

on the ground and for the reason that the evidence supports the said finding.

Defendant excepts to the refusal of the Court to make finding of fact No. IX proposed by the defendant, reading as follows, to-wit:

> That by reason of the inability of the plaintiff to procure and purchase "Green Streak"

gasoline from the defendant, the plaintiff has not lost any business nor suffered any damage and will not lose any business or suffer any damage as a consequence thereof,

on the ground and for the reason that the evidence supports the said finding.

Defendant excepts to the refusal of the Court to make finding of fact No. X proposed by the defendant, reading as follows: [57]

That the said contract of November 25, 1929, contains also the following clause:

'It is mutually understood and agreed that either the Shell Company or the Petroleum Company may terminate and cancel this contract on twelve months' notice to the other party, provided said notice may not be given prior to November 30th, 1930',

and pursuant to said provision of said contract, the defendant did, on or about the 28th day of February, 1932, serve a twelve-months' notice of cancellation upon the plaintiff, and the said contract, by reason thereof, will terminate on the 28th day of February, 1933,

on the ground and for the reason that the evidence supports the said finding.

Defendant excepts to the refusal of the Court to make conclusion of law No. I proposed by the defendant, reading as follows, to-wit:

That the defendant has not violated any of the provisions of its contract with the plaintiff herein,

on the ground and for the reason that the said conclusion is supported by the evidence and the law.

Defendant excepts to the refusal of the Court to make conclusion of law No. II proposed by the defendant, reading as follows, to-wit:

That the plaintiff has not sustained any damage by reason of anything done by the defendant in the performance of the contract herein,

on the ground and for the reason that the said conclusion is supported by the evidence and the law.

Defendant excepts to the refusal of the Court to make conclusion of law No. III proposed by the defendant, reading as follows, to-wit:

That no emergency exists and the plaintiff is not entitled to any injunctive relief directing specific performance of the contract or for any purpose,

on the ground and for the reason that the said conclusion is supported by the evidence and the law.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendant. [58]

Foregoing exceptions are allowed this 8 day of September, 1932.

NETERER,
District Judge.

Service of original by receipt of a copy admitted this 8 day of Sept., 1932.

PEYSER & BAILEY.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [58]

[Title of Court and Cause.]

EXCEPTIONS TO FINDINGS.

Defendant excepts to the following findings and each of them made by the Court on the ground and for the reason that the same are not supported by the evidence in the cause, to-wit:

I.

It is in evidence, on behalf of the witnesses of the defendant, and whom I think knew what they were talking about, that the change from the Shell 400 was made to the Super Shell when they felt that a new name should be supplied. I think Shell 3-Energy, likewise, superseded the Super Shell when they felt that that name had worn out its usefulness. And upon inquiry from the court, stated that the names were changed so the prices could be raised and he said "Possibly" or words to that effect.

II.

I concluded from the testimony that the several grades enumerated, the Super Shell, the Shell Ethyl, the 3-Energy and the 400 were practically the same.

III.

I believe, and I should say in this connection, that from the evidence I am convinced beyond any question of doubt that the Green Streak was supplied to the trade, insofar as demand was made, except as to the plaintiff here, and persons likely situated. [60]

IV.

There is no evidence that any applications for Green Streak were denied.

V.

There is evidence that before Green Streak was furnished to some of the distributors who had contracts, that the defendant company required the dealer to sign a contract agreeing that this may be withdrawn at any time. This the defendant could have done without any contract, provided it had withdrawn it from the trade.

There is nothing in the contract which required it to produce this gasoline or required it to continue delivery, if it ceased to produce it, because the limitation is upon the quality at the time of delivery, so that the waiver of contract upon the issue in this case is entirely immaterial, and, I think, that practically disposes of your suggestion upon the trial as to its introduction.

VI.

I also believe that, applying the doctrine of ejusden generis to the construction of this contract,

that the parties themselves have defined the meaning of the word "delivery" and the gasoline that was to be delivered. Under the rule of ejusden generis, where general terms precede specific designations, the specific designation or description controls.

VII.

That sentence or phrase controls the entire meaning of the contract as to the gasoline to be delivered, and when the gasoline for motor vehicle operation of the better quality was delivered—and the only quality then dealt in by the defendant,—they afterwards made another quality for the same use in operation of the same motor vehicles, of a less price,—it was required under [61] the terms of the contract to deliver it. And I think, likewise, as I intimated a moment ago, that aside from this construction, which I think is controlling, that this gasoline was furnished and sold to the general trade that asked for it.

VIII.

The Shell Company, Inc., is a distinct entity, and while it is controlled and owned by the Shell Company for the purpose of distribution of its products, it was organized and the Green Streak was furnished to it, and furnishing it to the Shell Company, Inc., in law, would be the same as delivering it to any other third person, because the Shell Company, Inc., is a distinct entity, controlled, however, and owned, as it was, by the Shell Company.

IX.

I am convinced beyond any question of doubt in this case from the evidence and the examination of this contract, that that was the intent of the parties at all times, and at the time of the execution of the contract.

X.

The evidence shows that the plaintiff company was organized for the purpose of making this distribution, and that it has built a large distributing agency. Aside from the testimony of the president of the company, the first witness, that large sums of money have been expended and business has been developed, the testimony of the defendant witnesses was that he was selling too much gasoline, and that by continuing at the same rate of sale, from 350,000 to 400,000 gallons a month, his supply would be exhausted in two months. And to build up a business of that type, the court must judicially know, requires an expenditure of money, application of energy, and the construction of an organization which cannot be built up in a day, and which is of great value. [62]

XI.

It is likewise in evidence, and I think the conclusion is reasonable, that in order to compete in the market in the sale of gasoline with the concerns that sell the cheaper gasoline and to meet which competition this gasoline was produced, that it is necessary to have this gasoline.

XII.

It is in evidence that the plaintiff has entered into a contract with several distributing agencies, to whom it is agreed to supply gasoline, and that it is unable to have these contracts renewed, for the reason that it cannot agree, under the present conditions, to supply the cheaper grade, and they are, therefore, losing a part of their customers, which of course depletes the corporate construction of the distribution agency.

XIII.

It is likewise in evidence, and it is not disputed, that the plaintiff has been selling the higher priced gasoline at the low price for the purpose of retaining its trade, and that it has practically exhausted its resources, and I believe from the testimony, that it would have to cease operation within two or three weeks.

XIV.

The court is not impressed with the thought that the non-delivery of this gasoline to the plaintiff was for the purpose of protecting its trade name in the distribution of quality gasoline produced by it. If that was the thought in mind of the defendant, it would not have made the product, but it was made for that specific purpose.

XV.

I don't believe that the plaintiff has an adequate and speedy remedy at law. I believe it would be

practically impossible to measure the damages which would be sustained by the plaintiff, [63] should the court relegate him to his legal remedy—an action at law.

XVI.

I think that the status and relation of these parties, the peculiar relation in which the plaintiff is placed with relation to the trade and to the public, his contractual relation to agents and his inability to meet requirements which the trade demands with relation to the cheaper gasoline, are such that the legal remedy is not adequate, and is not speedy.

XVII.

Nor do I think that the mere fact that the plaintiff is entitled to only 800,000 gallons of gasoline and that this could be delivered within two months, should have any weight with the court. The issue now is acute. The plaintiff has a right, of which he is deprived, and I think the defendant should be required to specifically perform, and a decree accordingly will follow.

XVIII.

I do not think that the other case referred to in this jurisdiction with relation to the delivery of oysters of special grades, quantities, and qualities, and various times, and ways, has any application here. This case requires no supervision. The only requirement will be that this gasoline be delivered upon payment therefor. That is all that there is to

it. And when the 800,000 gallons are delivered, the obligation is complete.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendants. [64]

Service of original by receipt of a copy admitted this 8 day of April, 1932.

PEYSER & BAILEY.

Foregoing exceptions are allowed this 8 day of September, 1932.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [65]

[Title of Court and Cause.]

DECREE.

This case having come on regularly for trial before the Honorable Jeremiah Neterer, Judge of the above entitled court, complainant being represented by its attorneys Peyser and Bailey, and the defendant being represented by its attorneys Hyland, Elvidge & Alvord; and the court having listened to testimony and at the conclusion of said trial having made oral findings of fact, which have been reduced to writing and filed as the findings of fact herein;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendant be and it is hereby enjoined from breaking or vio-

lating its contract with complainant and, pursuant to the terms of said contract, to sell to said complainant, for cash at the time of delivery, Green Streak gasoline of the grade and character it is selling generally to its dealer trade in Seattle and King County, Washington, and otherwise to comply with the terms and conditions of said contract; provided, however, that nothing herein contained shall be construed as compelling the defendant to furnish complainant with more than an aggregate total of 800,000 gallons of gasoline of any grade or quality between the date hereof and December 15, 1932; and provided, further, that nothing herein [66] contained shall be construed as compelling the defendant to perform the contract herein subsequent to February 28, 1933.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon further application to this court a date be set for the purpose of determining what, if any, damage the complainant may have sustained by reason of the failure of the defendant to furnish Green Streak gasoline to the complainant heretofore.

The court herein expressly makes no findings or order with reference to any indebtedness, if any, of the complainant to the defendant arising out of the sale heretofore by defendant to the complainant of gasoline or other petroleum products under the contract herein, and this decree shall not operate as a bar or be construed to be res adjudicata concerning the claim by defendant upon complainant

of any such indebtedness, said claim, if any, being a legal claim disposable in a law action and not an issuable fact in this case.

Exception is allowed to the defendant to the whole of this decree and each and every part thereof adverse to the defendant.

Done in open court this 8th day of September, 1932.

JEREMIAH NETERER,
Judge.

Copy Rec'd 9/8/32.

HYLAND, ELVIDGE & ALVORD,
Attys. for Deft.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [67]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Jeremiah Neterer, Judge of the above entitled Court:

The above named defendant, Shell Oil Company, feeling itself aggrieved by the judgment made and entered in this cause on the 8th day of September, 1932, does hereby appeal from that portion of the judgment and decree and the whole thereof in said cause, and that judgment and decree which awards to the plaintiff herein a mandatory injunction requiring the said defendant to perform a certain

contract for the sale of gasoline known as Greenstreak, and also from that portion of the decree awarding a judgment for costs against the defendant, and also from that portion of the decree directing the cause to be continued to a date certain or the imposition thereof fixing the amount of the damages alleged to have been suffered by the above named plaintiff. Such appeal is to the United States Circuit Court of Appeals for the Ninth Circuit, and such appeal being for the reason specified in the Assignment of Error which is filed herewith, and the said defendant prays that this appeal be allowed and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, fully authenticated, will be sent [68] to the United States Circuit Court of Appeals for the Ninth Circuit sitting in San Francisco, the State of California.

And your petitioner further prays that the proper order touching the security required of it to perfect its appeal be made and that the appeal bond be fixed in the sum of One Thousand Dollars ($1,000.00), and your said petitioner further prays at this time that the court fix a supersedeas bond separate and apart from the ordinary appeal bond which will stay and supersede the effect of the said mandatory injunction during the pendency of the appeal, and your petitioner is ready, willing and able to make, execute and file the necessary super-

sedeas bond in such reasonable sum as to the court may seem fit.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Petitioner.

Service of Original by Receipt of a copy admitted this 8 day of Sept., 1932.

PEYSER & BAILEY,

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [69]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the defendant, Shell Oil Company, a corporation, defendant in the above entitled cause and in connection with its petition on appeal in this cause assigns the following errors relied upon to reverse the judgment and decree herein:

I.

The Trial Court erred in entering the decree in this cause granting and issuing a mandatory injunction compelling the defendant to furnish "Green Streak" gasoline to the plaintiff on the ground and for the following reasons:

(a) There is no evidence that the plaintiff did not have a plain, speedy and adequate remedy at law, assuming that the product came within the terms of the contract.

(b) There was no allegation, nor evidence, nor finding that the defendant was insolvent or unable to respond in damages.

(c) The damages which the plaintiff might have sustained, if any, were reasonably ascertainable at law, assuming the product came within the terms of the contract.

(d) There is no evidence that the product "Green Streak" was Shell gasoline of the quality the Shell Oil Company was, at the time of delivery, selling to its [70] dealer trade generally in Seattle, Washington.

(e) The evidence showed that the product "Green Streak" was not gasoline of the quality the Shell Oil Company was at the time of delivery selling to its dealer trade generally in Seattle, Washington.

(f) There was no evidence that the product "Green Streak" was gasoline of the character ordinarily sold by the defendant Shell Oil Company to service station operators for motor vehicle operation.

(g) The evidence showed that the product "Green Streak" was not gasoline of the character ordinarily sold by the Shell Oil Company to service station operators for motor vehicle operation.

II.

There was no evidence that the plaintiff sustained any damage by reason of the refusal of the defendant to sell and deliver the product "Green Streak" to the plaintiff.

III.

There is no evidence that the plaintiff would have sustained any damage by reason of the refusal of the defendant Shell Oil Company to sell and deliver "Green Streak" to the plaintiff.

IV.

The Trial Court erred in permitting the witness Polsky to testify to what was said at the time demands were made upon the defendant to furnish "Green Streak" gasoline as follows:

"The COURT.—What was said by these parties at the time?

Mr. ELVIDGE.—To that question we want to object on the ground it is incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. ELVIDGE.—Exception.

A. Mr. E. L. Miller, in San Francisco, told me the reason they would not furnish me this gasoline was that every major oil company who was operating the Pacific Coast—he mentioned all of them—were not going to furnish their jobbers any such grade of gasoline, and neither was the Shell Oil Company going to furnish me any. [71]

The COURT.—That was the Vice President said that?

A. Yes, sir.

The COURT.—And what did the other men say?

A. Practically the same thing."

V.

The Trial Court erred in permitting the witness Polsky to testify to what was said at other conferences concerning the delivery of "Green Streak" gasoline to the plaintiff as follows:

"The COURT.—Did you have any other conferences with any of them?

A. Yes, I had a conference in Portland.

The COURT.—With whom?

A. At the Portland Hotel, with Mr. E. L. Miller, and again with Mr. Lakin.

The COURT.—What was said at that time?

Mr. ELVIDGE.—The same objection, Your Honor.

The COURT.—Overruled.

Mr. ELVIDGE.—An exception.

A. At that time, when I walked into the conference room there, why, I was given to understand——

The COURT (interrupting).—No, what was said?

A. They told me they were working on a plan to give me and furnish me this Green Streak gasoline. We talked over for an hour or two several methods by which they would give it to me.

The COURT.—Just tell us what they said.

A. They were laying down certain rules and regulations so I would be permitted to resell it to the dealers. We finally formulated two different plans that were acceptable to both of us to permit me to sell this gasoline. Then E. L. Miller disappeared from the room, and I have reason, well, I don't know who he talked to, but he told me he would talk to San Francisco, to the President, Mr. Jones, and he returned and said 'We decided not to give you any Green Streak gasoline.'

The COURT.—Did you have any further conference with anyone?

A. Yes, I come to see Mr. Miller in San Francisco again after that and pleaded with him.

The COURT.—That is the assistant manager?

A. No, Mr. E. L. Miller was the vice-president.

The COURT.—What was said then?

A. Well, there was a lot of——

The COURT (interrupting).—In substance.

A. In substance they tried to buy me out, and the offer they gave me was so ridiculous I had to refuse it.

The COURT.—Just what was said?

A. They wanted to buy me out, and when I refused they gave me to understand I couldn't have any Green Streak gasoline, told me I couldn't have any Green Streak gasoline. And when I explained to them it would be impossible for me to stay in business, and it was a violation of our contract, both written and oral, they said 'You will have to

take your own chances, we are only going to sell you 3-Energy gasoline and not Green Streak gasoline.' [72]

The COURT.—Make any further demand?

A. Not after that last conference.

The COURT.—Those were the only conversations you had?

A. Yes, sir, Mr. Jones, President at San Francisco, was present, and he told me definitely they would not give me any Green Streak gasoline.

The COURT.—So he told you that himself?

A. Yes, sir.

The COURT.—Proceed."

VI.

The Trial Court erred in permitting the witness Polsky to testify to the amount or percentage of gasoline that the plaintiff was selling as a result of the demand for Green Streak and the price at which it was being sold, and his loss with respect thereto as follows:

"Q. What did you do in order to save yourself until this case could be heard?

Mr. ELVIDGE.—Objected to as being irrelevant, incompetent and immaterial.

The COURT.—Were you able to supply yourself, or anybody, with cheap gasoline of the same standard and form?

A. No, sir, I am not. I am selling today my first quality gasoline at the cheapest price, at a very great loss to me.

The COURT.—And there is demand for this cheap quality?

A. Oh, yes, Your Honor, great demand, growing day by day.

Q. Approximately what percentage of the gasoline that you sell is a result of the cheap demand?

A. The entire month of August I sold 33 per cent of my sales were the cheaper brand of Skookum gasoline that I am marketing. By that I mean it is my first grade gasoline, but I am selling it at a cheaper price to be a competitor with cheaper gasolines that are on the market. The last week in August the sales have been more, the demand has become greater, and in the last week in August, where the entire month showed 33 per cent, the last week showed over 51 per cent, and today I am selling over 50 per cent of my total sales on the gasoline that is sold under the brand name of 'Skookum.'

The COURT.—What is the difference between the selling price of the higher grade and the cheap price?

A. The difference is four cents a gallon and the selling price is two cents a gallon.

The COURT.—Two cents a gallon?

A. Two cents a gallon is the price it should——

The COURT (interrupting).—How much profit do you make on the better grade of gasoline? What do you pay for the better grade?

A. My contract is based on a sort of a commission proposition that provides for a two and a half

per cent a gallon commission, and over a number of years my records show that my gross profits—my contract [73] calls for a profit of two and a half cents a gallon. My gross gallon profit is about a half cent.

The COURT.—A half cent in selling the better grade for the cheap?

A. No, sir, I am losing today about two cents a gallon.

The COURT.—So it is a difference between a half cent profit and two and a half cents?

A. That's right.

Q. You are losing that on this gasoline that you are selling at the reduced price in order to meet the competition?

A. Yes, sir."

VII.

The Trial Court erred in permitting the witness Polsky to testify to the loss or damage plaintiff was sustaining by reason of the refusal of the defendant to deliver Green Streak gasoline to the plaintiff.

VIII.

The Trial Court erred in admitting any testimony with reference to loss or damage already sustained by plaintiff by reason of previous refusal of defendant to deliver Green Streak gasoline to the plaintiff.

IX.

The Trial Court erred in admitting any testimony with reference to loss or damage plaintiff might in future sustain by reason of continued refusal on the part of the defendant to deliver Green Streak gasoline to plaintiff.

X.

The Trial Court erred in permitting the witness Polsky to testify that demands had been made upon him by operators and dealers for delivery of Green Streak gasoline.

XI.

The Trial Court erred in permitting the witness Polsky to testify that he had contracted to sell Green Streak gasoline to operators or dealers. [74]

XII.

The Trial Court erred in refusing to permit the witness Lakin to testify as to the policy of the defendant with reference to its marketing and sale of Green Streak gasoline in Seattle.

XIII.

The Trial Court erred in refusing to permit the witness Lakin to testify to the number of 100% dealers in the Northern Division who did not have Green Streak gasoline.

XIV.

The Trial Court erred in refusing to permit the witness Lakin to testify to the written acknowledgments or waivers required by defendants from dealers on contract with defendant before permitting such dealers to obtain Green Streak gasoline.

XV.

The Trial Court erred in sustaining objection to the admission of such written acknowledgment or waivers, being defendant's Exhibits "A" for identification.

XVI.

The Trial Court erred in refusing to permit the witness Miller to testify concerning the sale of Green Streak gasoline on the Pacific Coast generally.

XVII.

The Trial Court erred in refusing to permit the defendant to prove any fact under its affirmative defense.

XVIII.

The Trial Court erred in refusing to permit defendant to prove plaintiff was in default under the contract for failure for refusal to pay cash for gasoline sold and delivered under the contract. [75]

XIX.

The Trial Court erred in permitting the witness Polsky to testify to statements or threats made to him with reference to commencement of suits by dealers, as follows:

"Q. Now, Mr. Polsky, as a result of this breach of the contract, have any of your service station dealers made statements or threats with reference to commencement of suits?

Mr. ELVIDGE.—Objected to, Your Honor, as being hearsay, as well as incompetent, irrelevant and immaterial.

The COURT.—No, he may answer. Have you contracts with your sub-stations?

A. Yes, sir, we have.

The COURT.—And are you able to comply with the terms of those contracts?

A. No, sir, we are not able to.

The COURT.—Have any of these parties threatened you with suit for damages?

A. Yes, sir.

The COURT.—For failure to furnish gasoline?

A. Yes, sir, they have.

Mr. ELVIDGE.—May I suggest this to Your Honor, that the proper testimony by the witness on that point would be to bring in those contracts themselves?

The COURT.—Well, you can ask him to bring them in, if you want them.

Mr. ELVIDGE.—I think before he testifies to them they should be here.

The COURT.—They are merely incidental to the issue in this case.

Mr. ELVIDGE.—I move to strike the answer, Your Honor, on the ground——

The COURT (interrupting).—Denied.

Mr. ELVIDGE.—Exception.

Q. How long does your contract have to run, Mr. Polsky?

The COURT.—It speaks for itself.

Q. Now, Mr. Polsky, you have different contracts with different of your customers?

A. Yes, sir.

Q. As a result of any action on the part of the Shell Company, have a certain class of contracts been entered into with some of your customers?

Mr. ELVIDGE.—I object to that, Your Honor, because I think it is only fair to the defendant——

The COURT (interrupting).—The objection is sustained. He has already covered that fully in the answer to my question.

Mr. BAILEY.—An exception to the Court's ruling.

Q. Mr. Polsky, I hand you two blank contracts, which will be marked as Plaintiff's Exhibits '2' and '3,' and ask you whether or not those are the form of contracts which you have used with one of your stations?

A. They are.

Q. And at whose request?

A. The Shell Oil Company's request.

Mr. ELVIDGE.—Object to it, if the Court please, at whose request they were entered into, unless the contract shows on its face. [76]

Mr. BAILEY.—The contract shows on its face they were entered into between the Shell Oil Company and the——

The COURT (interrupting).—Let me make this observation: This is exactly the matter I think the Court ruled on a moment ago, and to come in now, after the Court has disposed of it——

Mr. BAILEY (interrupting).—I didn't want——

The COURT (interrupting).—If he wants those things he can ask to bring them in. But I am satisfied with the testimony that is already in.

Mr. BAILEY.—I withdraw the offer, and that is all.

Mr. ELVIDGE.—I move to strike his testimony.

The COURT.—You already did, and I denied it.

Mr. ELVIDGE.—On the ground the contracts are now produced, and show they are contracts between the defendant Shell Oil Company and other persons.

The COURT.—They are not in evidence.

Mr. ELVIDGE.—No, but his testimony is in evidence, Your Honor.

The COURT.—Well, suppose it is. The contracts are not in. There is nothing before the Court.

Mr. ELVIDGE.—An exception, if the Court please, to my request, Your Honor, that his testimony be stricken." [77]

XX.

The Trial Court erred in making the following finding:

> "It is in evidence, on behalf of the witnesses of the defendant, and whom I think knew what they were talking about, that the change from the Shell 400 was made to the Super Shell when they felt that a new name should be supplied. I think Shell 3-Energy, likewise, superseded the Super Shell when they felt that that name had worn out its usefulness. And upon inquiry from the court, stated that the names were changed so the prices could be raised and he said, 'Possibly,' or words to that effect."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXI.

The Trial Court erred in making the following finding:

> "I concluded from the testimony that the several grades enumerated, the Super Shell, the Shell Ethyl, the 3-Energy and the 400 were practically the same."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXII.

The Trial Court erred in making the following finding:

> "I believe, and I should say in this connection, that from the evidence I am convinced beyond any question of doubt that the Green Streak was supplied to the trade, insofar as demand was made, except as to the plaintiff here, and persons likely situated."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXIII.

The Trial Court erred in making the following finding:

> "There is no evidence that any applications for Green Streak were denied."

on the ground and for the reason that there was no competent evidence upon which to base the same. [78]

XXIV.

The Trial Court erred in making the following finding:

> "There is evidence that before Green Streak was furnished to some of the distributors who had contracts, that the defendant company required the dealer to sign a contract agreeing that this may be withdrawn at any time. This the defendant could have done without any contract, provided it had withdrawn it from the trade.
>
> There is nothing in the contract which required it to produce this gasoline or required

> it to continue delivery, if it ceased to produce it, because the limitation is upon the quality at the time of delivery, so that the waiver of contract upon the issue in this case is entirely immaterial, and, I think, that practically disposes of your suggestion upon the trial as to its introduction."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXV.

The Trial Court erred in making the following finding:

> "I also believe that, applying the doctrine of ejusdem generis to the construction of this contract, that the parties themselves have defined the meaning of the word 'Delivery' and the gasoline that was to be delivered. Under the rule of ejusdem generis, where general terms precede specific designations, the specific designation or description controls."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXVI.

The Trial Court erred in making the following finding:

> "That sentence or phrase controls the entire meaning of the contract as to the gasoline to be delivered, and when the gasoline for motor ve-

> hicle operation of the better quality was delivered,—and the only quality then dealt in by the defendant,—they afterwards made another quality for the same use in operation of the same motor vehicles, of a less price,—it was required under the terms of the contract to deliver it. And I think, likewise, as I intimated a moment ago, that aside from this construction, which I think is controlling, that this gasoline was furnished and sold to the general trade that asked for it." [79]

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXVII.

The Trial Court erred in making the following finding:

> "The Shell Company, Inc., is a distinct entity, and while it is controlled and owned by the Shell Company for the purpose of distribution of its products, it was organized and the Green Streak was furnished to it, and furnishing it to the Shell Company, Inc., in law, would be the same as delivering it to any other third person, because the Shell Company, Inc., is a distinct entity, controlled, however, and owned, as it was, by the Shell Company"

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXVIII.

The Trial Court erred in making the following finding:

> "I am convinced beyond any question of doubt in this case from the evidence and the examination of this contract, that that was the intent of the parties at all times, and at the time of the execution of the contract"

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXIX.

The Trial Court erred in making the following finding:

> "The evidence shows that the plaintiff company was organized for the purpose of making this distribution, and that it has built a large distributing agency. Aside from the testimony of the president of the company, the first witness, that large sums of money have been expended and business has been developed, the testimony of the defendant witnesses was that he was selling too much gasoline, and that by continuing at the same rate of sale, from 350,000 to 400,000 gallons a month, his supply would be exhausted in two months. And to build up a business of that type, the court must judicially know, re- [80] quired an expenditure of money, application of energy, and the con-

> struction of an organization which cannot be built up in a day, and which is of great value."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXX.

The Trial Court erred in making the following finding:

> "It is likewise in evidence, and I think the conclusion is reasonable, that in order to compete in the market in the sale of gasoline with the concerns that sell the cheaper gasoline and to meet which competition this gasoline was produced, that it is necessary to have this gasoline."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXXI.

The Trial Court erred in making the following finding:

> "It is in evidence that the plaintiff has entered into a contract with several distributing agencies, to whom it is agreed to supply gasoline, and that it is unable to have these contracts renewed, for the reason that it cannot agree, under the present conditions, to supply the cheaper grade, and they are, therefore, losing a part of their customers, which of course

depletes the corporate construction of the distribution agency"

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXXII.

The Trial Court erred in making the following finding: [81]

"It is likewise in evidence, and it is not disputed, that the plaintiff has been selling the higher priced gasoline at the low price for the purpose of retaining its trade, and that it has practically exhausted its resources, and I believe from the testimony, that it would have to cease operation within two or three weeks."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXXIII.

The Trial Court erred in making the following findings:

"The Court is not impressed with the thought that the non-delivery of this gasoline to the plaintiff was for the purpose of protecting its trade name in the distribution of quality gasoline produced by it. If that was the thought in mind of the defendant, it would not have made the product, but it was made for that specific purpose."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXXIV.

The Trial Court erred in making the following finding:

> "I don't believe that the plaintiff has an adequate and speedy remedy at law. I believe it would be practically impossible to measure the damages which would be sustained by the plaintiff, should the court relegate him to his legal remedy—an action at law."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXXV.

The Trial Court erred in making the following finding: [82]

> "I think that the status and relation of these parties, the peculiar relation in which the plaintiff is placed with relation to the trade and to the public, his contractual relation to agents and his inability to meet requirements which the trade demands with relation to the cheaper gasoline, are such that the legal remedy is not adequate, and is not speedy."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXXVI.

The Trial Court erred in making the following finding:

> "Nor do I think that the mere fact that the plaintiff is entitled to only 800,000 gallons of gasoline and that this could be delivered within two months, should have any weight with the court. The issue now is acute. The plaintiff has a right, of which he is deprived, and I think the defendant should be required to specifically perform, and a decree accordingly will follow."

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXXVII.

The Trial Court erred in making the following finding:

> "I do not think that the other case referred to in this jurisdiction with relation to the delivery of oysters of special grades, quantities, and qualities, and various times, and ways, has any application here. This case requires no supervision. The only requirement will be that this gasoline be delivered upon payment therefor. That is all that there is to it. And when the 800,000 gallons are delivered, the obligation is complete." [83]

on the ground and for the reason that there was no competent evidence upon which to base the same.

XXXVIII.

The Trial Court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

> "That on the 25th day of November, 1929, a contract in writing was entered into by and between the parties hereto, which contract has been admitted in evidence in this case, which contains the following provisions, to-wit:
>
> 'The Petroleum Company agrees to buy from the Shell Company and the Shell Company agrees to sell to the Petroleum Company, on the terms and in the manner hereinafter set forth, all the gasoline for use and resale in the City of Seattle and its immediate and adjacent suburbs, which the Petroleum Company requires and deals in, said quantity not to be less than 1,200,000 gallons, nor more than 4,000,000 gallons in any one year, reckoning from December 15, 1929, and not less than 100,000 gallons, nor more than 400,000 gallons for any one month, reckoning from December 15, 1929, said quantities to be bought, received and paid for by the Petroleum Company in a month or year as the case may be.
>
> 'It is mutually understood and agreed that gasoline so bought from said Shell Company by said Petroleum Company is to be Shell gasoline of the quality the Shell Company is

at the time of delivery selling to its dealer trade generally in Seattle, [84] Washington.

'It being further understood that the word "Gasoline" as used throughout this contract shall be construed to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude all special refined or blended gasoline sold by it for special purposes at an increased price or prices,' "

on the ground and for the reason that the same is supported by competent evidence in the case.

XXXIX.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

That at the time the complainant and defendant entered into said contract, the defendant was selling to the dealer trade generally in Seattle, Washington, a brand of gasoline known as "Shell Dry 400"; that thereafter the defendant placed on the market and sold generally to the dealer trade and to the complainant herein substantially the same brand of gasoline under the name of "Shell 3-energy," which gasoline the defendant sold and delivered to the plaintiff pursuant to the above mentioned contract; that approximately eight or ten months after the execution of the contract, the defend-

ant placed on the market and sold and delivered to its dealer trade generally in Seattle, Washington, a specially refined or blended gasoline manufactured for special purposes which was sold at an increased price over that known as "Shell 3-energy," and known as "Super-Shell," and did decline by reason of the provisions of the aforesaid contract to deliver and sell the said brand of gasoline to the plaintiff, but shortly thereafter did, by reason of an oral modification of the contract in that regard, and despite the terms of the contract, deliver and sell the said specially blended gasoline to the plaintiff; that thereafter and during the forepart of the year 1932, the defendant commenced to market and distribute generally to its dealer trade in Seattle, Washington, substantially the same grade or quality of gasoline known as "Shell 400 Dry," under a new and different advertising name or brand known as "Shell 3-energy," and is continuing so to do; that during the year 1931, the defendant ceased to market and sell generally to its dealer trade in Seattle, Washington, and elsewhere that specially blended grade or brand of gasoline known as "Super Shell" and in lieu thereof did market and distribute and sell generally to its dealer trade in Seattle, Washington, and elsewhere a specially refined or blended gasoline known as "Shell Ethyl," which said product known as "Shell Ethyl" was marketed by the

> Shell Oil Company under a special license from the holders of the patent rights for the manufacture of said "Shell Ethyl," which patent rights [85] prohibit the defendant from selling the said brand known as "Shell Ethyl" to jobbers such as the plaintiff above named, and at the time of the commencement of marketing by defendant of said specially blended product as aforesaid, the defendant did decline to deliver the same to the plaintiff by reason of the aforesaid provisions of the contract, but shortly thereafter, despite the contract, and by reason of oral modification thereof in that regard, and despite the inhibition of said license, did sell and deliver the same to the plaintiff; and at all times the said "Super Shell" and said "Shell Ethyl" were sold and delivered to the plaintiff, the plaintiff knew that it was not entitled to receive same under the terms of the aforesaid contract,

on the ground and for the reason that the same is supported by competent evidence in the case.

XL.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

> "That the defendant has spent many thousands of dollars in promoting and advertising the product known as 'Shell 3-energy' and in developing it to a point where there was and is

> now a great demand therefor, which said product is a brand of gasoline which meets substantially all the requirements of motor-operated vehicles,"

on the ground and for the reason that the same is supported by competent evidence in the case.

XLI.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

> That on or about July 1, 1932, the defendant manufactured a grade of gasoline cheaper and inferior than and to the brand of gasoline known as "Shell 3-energy," which said cheap and inferior grade of gasoline was and is known as "Green Streak"; that the said brand of gasoline was manufactured for a special purpose, to-wit, to meet the competition of other gasolines sold at a cheaper price than the brand of gasoline sold under the name of "Shell 3-energy" and gasolines of other gasoline companies sold at approximately the same price as "Shell 3-energy"; that defendant did not market and distribute, and is not marketing and distributing, the same generally to its dealer trade in Seattle, Washington, nor on the Pacific Coast, nor was it, nor is it, of [86] the character ordinarily sold by defendant to service station operators for motor vehicle operation in Seattle, Washington, or on the Pacific Coast;

that the defendant, at the time of the trial of the above entitled cause, had in the City of Seattle approximately forty-eight (48) split pump dealers, otherwise known as dealers who handle petroleum products including gasoline of other oil companies to which the defendant has refused, and continues to refuse, to sell the said "Green Streak" gasoline, and the said split pump dealers cannot procure the same from the defendant; that the defendant had, at the time of the trial of the above entitled cause, approximately one hundred twenty-two (122) dealers in the City of Seattle handling Shell products exclusively known as 100% dealers, to only forty-eight (48) of whom the Shell Oil Company sold and delivered "Green Streak" gasoline, and refused to sell and deliver the same to any of the other exclusive or 100% dealers, and the said other exclusive and 100% dealers could not procure the same from the Shell Oil Company; that before the Shell Oil Company would sell the said "Green Streak" gasoline to said exclusive or 100% dealers, the defendant did require the said dealers to sign an acknowledgment, if the said dealers were buying gasoline from the defendant by contract, that, (1) If any "Green Streak" gasoline were delivered to them, it should be deemed to have been delivered to them in pursuance of the contract between the dealer and the defendant; (2) That the dealer would pay cash therefor on

delivery; (3) That the defendant might decline to deliver any of said gasoline at any time; and (4) That the said delivery of "Green Streak" gasoline should not be taken into consideration in computing the amount of any rental or other periodical payment payable under the contract in effect between the defendant and such dealer; that, at the time of the trial of the above entitled cause, the defendant sold gasoline to persons or gasoline vendors having a single pump on their premises for the dispensing of gasoline, but refused to deliver to the same any "Green Streak" gasoline, and the said single pump persons or dealers could not procure the same from the defendant,

on the ground and for the reason that the same is supported by competent evidence in the case.

XLII.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

That the defendant has refused to deliver the said "Green Streak" gasoline to the plaintiff, and, in so doing, the defendant has acted pursuant to the terms of the above mentioned contract between the defendant and the plaintiff, and, in so doing, did not commit a breach of the above mentioned contract between the defendant and the plaintiff,

on the ground and for the reason that the same is supported by competent evidence in th case. [87]

XLIII.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

> That for the purpose of protecting the trade name, reputation, standing, and marketability of the product known as "Shell 3-energy," the defendant has refused to sell "Green Streak" gasoline under any circumstances to, or permit the same to be obtained by, any person or operator or dealer who might sell the same under the name of "Shell 3-energy" gasoline, or in any other way permit it to be advertised or delivered so as to prejudice the trade name, standing, and marketability of said "Shell 3-energy" gasoline,

on the ground and for the reason that the same is supported by competent evidence in the case.

XLIV.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

> That it is not necessary for a service station operator or dealer to have for the purposes of sale "Green Streak" gasoline in order to successfully compete or meet the competition of other dealers or of other grades of gasoline,

on the ground and for the reason that the same is supported by competent evidence in the case.

XLV.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

> That by reason of the inability of the plaintiff to procure and purchase "Green Streak" gasoline from the defendant, the plaintiff has not lost any business nor suffered any damage and will not lose any business or suffer any damage as a consequence thereof,

on the ground and for the reason that the same is supported by competent evidence in the case.

XLVI.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

> That the said contract of November 25, 1929, contains also the following clause:
>
> 'It is mutually understood and agreed that either the Shell Company or the Petroleum Company may terminate and cancel this contract on twelve months' [88] notice to the other party, provided said notice may not be given prior to November 30th, 1930,' and pursuant to said provision of said contract, the defendant did, on or about the 28th day of February, 1932, serve a twelve-months' notice of cancel-

lation upon the plaintiff, and the said contract, by reason thereof, will terminate on the 28th day of February, 1933,

on the ground and for the reason that the same is supported by competent evidence in the case.

XLVII.

The trial court erred in refusing to make the following finding of fact proposed by the defendant, to-wit:

That the plaintiff has purchased from the defendant at the date hereof approximately 3,200,000 gallons of gasoline, and there remain to be delivered to and purchased by the plaintiff under said contract approximately 800,000 gallons of gasoline under the maximum clause of 4,000,000 up to and including the 15th day of December, 1932, and, pursuant to the terms of the contract, the defendant will not be required to deliver to the plaintiff any more than a total of 400,000 gallons between December 15, 1931, and December 15, 1932, or an approximate balance thereof in the sum of 800,000 gallons between the date hereof and the 15th day of December, 1932,

on the ground and for the reason that the same is supported by competent evidence in the case.

XLVIII.

The trial court erred in refusing to make the following conclusion of law proposed by the defendant, to-wit:

That the defendant has not violated any of the provisions of its contract with the plaintiff herein,

on the ground and for the reason that the same is according to law and supported by competent evidence in the case.

XLIX.

The trial court erred in refusing to make the following conclusion of law proposed by the defendant, to-wit:

That the plaintiff has not sustained any damage by reason of anything done by the defendant in the performance of the contract herein, [89]

on the ground and for the reason that the same is according to law and supported by competent evidence in the case.

L.

The trial court erred in refusing to make the following conclusion of law proposed by the defendant, to-wit:

That an emergency exists and the plaintiff is not entitled to any injunctive relief directing specific performance of the contract or for any purpose,

on the ground and for the reason that the same is according to law and supported by competent evidence in the case.

LI.

The Trial Court erred in decreeing specific performance of the contract as the proof showed that if there was any breach the damages were capable of ascertainment and there was no necessity for the granting of equitable relief.

WHEREFORE defendant prays that the judgment and decree be reversed and set aside, and that the action against the defendant be dismissed.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendant.

Service of original by receipt of a copy admitted this 8 day of Sept. 1932.

PEYSER & BAILEY.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [90]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendant herein having this day filed in this cause its petition for an appeal to the Circuit Court of Appeals for the Ninth Circuit,

NOW, THEREFORE, in consideration of the premises the petition of the defendant for such appeal is granted and said appeal is allowed.

IT IS FURTHER ORDERED that the bond on appeal herein be and the same is hereby fixed at the sum of One Thousand Dollars ($1,000.00),

which bond shall be conditioned as required by law.

Done in open Court this 8 day of September, 1932.

JEREMIAH NETERER,
Judge.

Service of original by receipt of a copy admitted this 8 day of Sept. 1932.

PEYSER & BAILEY.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [91]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That the Shell Oil Company, a corporation, defendant herein, as principal, and the United States Fidelity & Guaranty Company, a corporation, organized under the laws of the State of Maryland and authorized to transact business in the State of Washington, as surety, are held and firmly bound unto the Independent Petroleum Company, a corporation, the plaintiff herein, in the full sum of One Thousand Dollars ($1000.00) to be paid to said plaintiff, its successors or assigns, and which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 8 day of September, 1932.

WHEREAS lately in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between Independent Petroleum Company, a corporation, as plaintiff, and Shell Oil Company, a corporation, as defendant, a judgment and decree was entered against the said defendant, which decree among other things provided for a mandatory injunction requiring the above named defendant to furnish certain gasoline known as Greenstreak to the defendant, and requiring the [92] performance of said contract, requiring the payment of the costs of the said action and continuing the matter for a further time to fix the amount of damages plaintiff is alleged to have suffered, and the said defendant having obtained an appeal to the Circuit Court of the United States for the Ninth Circuit, and having filed a copy thereof in the office of the clerk of said court to reverse the said judgment and the whole of it, and the citation directed to said Independent Petroleum Company, a corporation, plaintiff, citing and admonishing it to be and appear at a session of the Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the 8th day of January, 1933.

Now, the condition of the above obligation is such that: if the Shell Oil Company, defendant

herein, shall prosecute its appeal to effect and will perform the judgment and answer all damages and costs if it fails to make this appeal good, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

Executed this 8th day of September, 1932.

(Seal) SHELL OIL COMPANY,
a corporation,
By HYLAND, ELVIDGE & ALVORD,
Its Attorneys of Record,
Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By JOHN C. McCOLLISTER,
Its Attorney in Fact,
Surety.

Service of original by receipt of a copy admitted this 8 day of Sept. 1932.

PEYSER & BAILEY.

The foregoing bond is hereby approved this 8th day of September, 1932.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [93]

(HEADING OF POSTAL
TELEGRAPH-CABLE CO.)

Received at
713 3rd Ave.
Seattle, Wash.
Telephone Main 2043.

1932 SEP 16 AM 9 00

EA3 36 NL COLLECT-G PORTLAND ORE
SEP 15

FORD ELVIDGE—
Attorney—

ORDER ENTERED TODAY GRANTING SUPERSEDEAS OIL CASE UPON GIVING BOND SUM OF TWENTY FIVE THOUSAND DOLLARS TO BE APPROVED BY JUDGE NETERER AND FILED WITH CLERK DISTRICT COURT SEND ME SAN FRANCISCO COPY PETITION FOR WRIT—

OBRIEN CLERK.

[Endorsed]: Filed Sep. 16 1932. Ed. M. Lakin, Clerk. [94]

[Title of Court and Cause.]

SUPERSEDEAS BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That the Shell Oil Company, a corporation, defendant herein, as principal, and the United States Fidelity & Guaranty Company, a corporation, organized under the laws of the State of Maryland

and authorized to transact business in the State of Washington, as surety, are held and firmly bound unto the Independent Petroleum Company, a corporation, the plaintiff herein, in the full sum of $25,000.00 to be paid to said plaintiff, its successors or assigns, and which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 16th day of September, 1932.

WHEREAS lately in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between Independent Petroleum Company, a corporation, as plaintiff, and Shell Oil Company, a corporation, as defendant, a judgment and decree was entered against the said defendant, which decree among other things provided for a mandatory injunction requiring the above named defendant to furnish certain gasoline known as Greenstreak to the defendant, and requiring the performance of said contract requiring the payment of the costs of the said action and continuing the matter for a further time to fix the amount of damages plaintiff is alleged to have suffered, and the said defendant having obtained an appeal to the Circuit Court of the United States for the Ninth Circuit, and having filed a copy thereof in the office of the clerk of said court to reverse the said judgment and the whole of it, and the citation directed [95] to said Inde-

pendent Petroleum Company, a corporation, plaintiff, citing and admonishing it to be and appear at a session of the Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the ..... day of January, 1933.

Now, the condition of the above obligation is such that if the Shell Oil Company, a corporation, defendant herein, shall prosecute its appeal to effect and will pay any judgment that may be recovered by the plaintiff in the above entitled cause and pay to plaintiff all damages that the plaintiff may sustain by reason of the fact that the injunction shall not issue herein, and any damages the plaintiff may sustain if the Shell Oil Company fails to make its appeal good herein, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

SHELL OIL COMPANY, a corporation,
By E. L. MILLER, Vice Pres.,
HYLAND, ELVIDGE & ALVORD,
Its Attorneys of Record,
Principal.

(Seal) UNITED STATES FIDELITY
& GUARANTY COMPANY,
By JOHN C. McCOLLISTER,
Its Attorney in Fact,
Surety.

Copy received Sept. 16th.
PEYSER & BAILEY.

The foregoing bond is hereby approved this 16 day of September, 1932, pursuant to telegram of Clerk of U. S. Circuit Court of Appeals.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 16, 1932. Ed. M. Lakin, Clerk. [96]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

Comes now the defendant and tenders to the plaintiff and serves and lodges its proposed statement of the evidence in the above entitled cause to be made a part of the record on appeal herein as follows, to-wit: [97]

STATEMENT OF THE EVIDENCE.

TESTIMONY OF PHILLIP S. POLSKY, FOR PLAINTIFF.

PHILLIP S. POLSKY, having been called by plaintiff as a witness, being first duly sworn, testified:

I am President and General Manager of the plaintiff, which is a wholesale distributor of gasoline and other Petroleum products. I have been engaged in the gasoline jobbing business eight years and in 1929 was in Portland as President and General Manager of the Oregon Petroleum Co. selling Shell gasoline 100% under our own plant. I came

(Testimony of Phillip S. Polsky.)

to Seattle in 1929. I had negotiations with I. J. Harvey of the Shell Oil Company at San Francisco and D. G. Fisher in Seattle, and as a result of those negotiations came to Seattle and formed the plaintiff corporation. Plaintiff's Exhibit "1" is the contract that was entered into.

Thereupon the plaintiff offered said contract in evidence and the same was admitted without objection as plaintiff's Exhibit "1" and made a part of the record.

WITNESS (continuing).—The plaintiff has approximately 150 accounts for the distribution of gasoline of which over one hundred are in Seattle and the balance in Tacoma.

Q. Mr. Polsky, in order that Judge Neterer may understand, there is another contract in Tacoma?

A. Yes, sir.

Q. The Independent Petroleum Company works in Seattle and Tacoma?

A. Yes, sir.

Q. And there is a Federal Court case in Tacoma involving this same question?

A. Yes, sir.

Q. And by agreement of counsel the decision in this case—— [98]

The COURT.—It is stipulated now in open court that the conclusion or judgment of this case shall be binding upon the parties in the case now pending in the Southern Division, and the parties will be bound by such conclusion and judgment?

(Testimony of Phillip S. Polsky.)

Mr. BAILEY.—That is correct.

WITNESS (continuing).—At the time the contract was entered into our Company was furnished gasoline under the trade name of "400-Dry." Later they placed a different brand of gasoline on the market known as "Super Shell," a premium gasoline. I imagine it was about one year later. About six months after that "Shell Ethyl" was the name of the next gasoline that was put on the market. This was followed by "3-Energy" Shell gasoline, and then Green Streak, which is the issue in this case.

I had no difficulty in getting the different brands of gasoline until we came to Green Streak. I demanded it but only obtained it during a short period in July through injunctive relief. I demanded Green Streak through Mr. Fisher, Division Manager in Seattle, and of Mr. Lakin, Assistant Division Manager in Seattle, and of E. L. Miller, Vice President at San Francisco. Gasoline was not furnished.

The COURT.—What was said by these parties at the time?

Mr. ELVIDGE.—To that question we want to object on the ground it is incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. ELVIDGE.—Exception. [99]

A. Mr. E. L. Miller, in San Francisco, told me the reason they would not furnish me this gasoline

(Testimony of Phillip S. Polsky.)

was that every major oil company who was operating the Pacific Coast—he mentioned all of them—were not going to furnish their jobbers any such grade of gasoline, and neither was the Shell Oil Company going to furnish me any.

The COURT.—That was the Vice-President said that?

A. Yes, sir.

The COURT.—And what did the other men say?

A. Practically the same thing.

The COURT.—Did you have any other conferences with any of them?

A. Yes, I had a conference in Portland.

The COURT.—With whom?

A. At the Portland Hotel, with Mr. E. L. Miller, and again with Mr. Lakin.

The COURT.—What was said at that time?

Mr. ELVIDGE.—The same objection, Your Honor.

The COURT.—Overruled.

Mr. Elvidge.—An exception.

A. At that time, when I walked into the conference room there, why, I was given to understand——

The COURT (interrupting).—No, what was said?

A. They told me they were working on a plan to give me and furnish me this Green Streak Gasoline. We talked over for an hour or two several methods by which they would give it to me.

(Testimony of Phillip S. Polsky.)

The COURT.—Just tell us what they said.

A. They were laying down certain rules and regulations so I would be permitted to resell it to the dealers. We finally formulated two different plans that were [100] acceptable to both of us to permit me to sell this gasoline. Then Mr. E. L. Miller disappeared from the room, and I have reason—well, I don't know who he talked to, but he told me he would talk to San Francisco, to the President, Mr. Jones, and he returned and said "We decided not to give you any Green Streak gasoline."

The COURT.—Did you have any further conferences with anyone?

A. Yes, I come to see Mr. Miller in San Francisco again after that and pleaded with him.

The COURT.—That is the assistant manager?

A. No, Mr. E. L. Miller was the vice-president.

The COURT. What was said then?

A. Well, there was a lot of——

The COURT (interrupting).—In substance?

A. In substance they tried to buy me out, and the offer they gave me was so ridiculous I had to refuse it.

The COURT.—Just what was said?

A. They wanted to buy me out, and when I refused they gave me to understand I couldn't have any Green Streak gasoline, told me I couldn't have any Green Streak gasoline. And when I explained to them it would be impossible for me to stay in

(Testimony of Phillip S. Polsky.)

business, and it was a violation of our contract, both written and oral, they said "You will have to take your own chances, we are only going to sell you 3-Energy gasoline and not Green Streak gasoline."

The COURT.—Make any further demand?

A. Not after that last conference.

The COURT.—Those were the only conversations you had? [101]

A. Yes, sir, Mr. Jones, President at San Francisco, was present, and he told me definitely they would not give me any Green Streak gasoline.

The COURT.—So he told you that himself?

A. Yes, sir.

The COURT.—Proceed.

WITNESS (continuing).—The plaintiff sells about one-third of all the Shell gasoline sold in Seattle and Tacoma.

Throughout the time I have had this contract with the defendant I have complied with each and every provision and the oral modifications thereof. No complaint was ever made to me that any of the terms had not been complied with prior to the commencement of this suit.

Shell Oil Company is selling Green Streak gasoline at this time generally to its dealer trade in Seattle and King County. It is not a specially refined or blended gasoline sold for a special purpose at an increased price. It is sold at a decreased price. The general price paid is 17¢. It is neces-

(Testimony of Phillip S. Polsky.)

sary for a service station operator to have a supply of Green Streak gasoline or a similar grade to be competitive.

Q. What did you do in order to save yourself until this case could be heard?

Mr. ELVIDGE.—Objected to as being irrelevant, incompetent and immaterial.

The COURT.—Were you able to supply yourself, or anybody, with cheap gasoline of the same standard and form?

A. No, sir, I am not. I am selling today my first quality gasoline at the cheapest price, at a very great loss to me.

The COURT.—And there is demand for this cheap quality?

A. Oh yes, Your Honor, great demand, growing day by day. [102]

Q. Approximately what percentage of the gasoline that you sell is a result of the cheap demand?

A. The entire month of August I sold 33 per cent of my sales were the cheaper brand of Skookum gasoline that I am marketing. By that I mean it is my first grade gasoline, but I am selling it at a cheaper price to be a competitor with cheaper gasolines that are on the market. The last week in August the sales have been more, the demand has become greater, and in the last week in August, where the entire month showed 33 per cent, the last week showed over 51 per cent, and today I am selling over 50 per cent of my total

(Testimony of Phillip S. Polsky.)

sales on the gasoline that is sold under the brand name of "Skookum."

The COURT.—What is the difference between the selling price of the higher grade and the cheap price?

A. The difference is four cents a gallon and the selling price is two cents a gallon.

The COURT.—Two cents a gallon?

A. Two cents a gallon is the price it should——

The COURT (interrupting).—How much profit do you make on the better grade of gasoline? What do you pay for the better grade?

A. My contract is based on a sort of a commission proposition that provides for a two and a half per cent a gallon commission, and over a number of years my records show that my gross profit—my contract calls for a profit of two and a half cents a gallon. My gross gallon profit is about a half cent.

The COURT.—A half cent in selling the better grade for the cheap? [102]

A. No, sir, I am losing today about two cents a gallon.

The COURT.—So it is a difference between a half cent profit and two and a half cents?

A. That's right.

Q. You are losing that on this gasoline that you are selling at the reduced price in order to meet the competition?

A. Yes, sir.

(Testimony of Phillip S. Polsky.)

WITNESS (continuing).—That does not represent the damage to my Company.

Since I have been in business in Seattle aviation is the brand that we have pushed as our first quality gasoline. It is a registered trade name. Has always been a first quality gasoline and so generally known by the buying public. It is the best gasoline that Shell puts out.

We have spent many thousands of dollars in advertising the name of Aviation, radio, newspapers and every manner in the regular journals; we have worked for three years personally boosting that name, until it is generally known throughout the territory, that the name of Aviation represents the first grade quality of gasoline. And there has been a demand for this gasoline that has been very profitable to our company. The result of being forced to sell that same gasoline under a different brand is slowly ruining the demand to the name of "Aviation." We are selling—it is generally known the dealer buys the same gasoline for two different payments out of one compartment in the tank truck. He sells one for 17 and asks 21 for the other. The demand for aviation gasoline has been very great, but day by day is slowly falling off until within thirty days there will be no demand for it. They are quitting buying Aviation gasoline and buying Skookum gasoline for 17 cents, and are ruining the business we have developed. All the money we have spent, and the effort [104]

(Testimony of Phillip S. Polsky.)

we have put forth, it is ruined. Why should they pay 21 cents when there is 17 cents for the same identical gasoline? And it would be easier for the dealer to sell gasoline at 17 cents than 21. I cannot approximate what would be our damage.

Q. Now, I will ask you this question, Mr. Polsky: As a result of your inability to have Green Streak gasoline has there been any change in the relationship existing between you and your dealers?

A. Yes, sir, there has.

Mr. ELVIDGE.—Just a moment, please. Objected to on the ground it is incompetent, irrelevant and immaterial.

The COURT.—What effect does the Green Streak have on your general relation to the gasoline distribution business in the city of your location?

A. A very bad effect.

The COURT.—In what way?

A. This way: The past three years we have always been in the competitive position that we have been able to furnish our customers with gasoline of the same quality and price as other marketing companies furnish. We have therefore enjoyed their confidence. Recently, when we have been unable to furnish this grade of gasoline, and when it is generally known that our source of supply was very indefinite, these dealers are feeling that it is very necessary for them to have that grade of gasoline, and in the conduct of their busi-

(Testimony of Phillip S. Polsky.)

ness they have looked elsewhere for a source of supply. They have felt that we are not in a strong position, competing position, that we have been in the past, and it has been very difficult for us to hold what business we are holding, and we have lost some business.

The COURT.—Are you a general distributor here? [105]

A. Yes, sir.

The COURT.—To local stations?

A. Yes, to local stations; that is, the garages, and some stations that own outright and have a lease on.

The COURT.—To how many persons do you distribute gasoline who are not of your concern, not owned by you, approximately?

A. Oh, way over a hundred.

The COURT.—Over a hundred?

A. Way over a hundred.

The COURT.—And you say you are losing these persons by reason of your failure to provide this grade of gasoline?

A. Yes, sir.

Mr. ELVIDGE.—Your Honor, I would like to object to that last question, and move to strike it.

The COURT.—The motion to strike is denied.

Mr. ELVIDGE.—Exception.

WITNESS (continuing).—Our credit standing has been very greatly impaired. We have no way of ascertaining the damage that has been sustained.

(Testimony of Phillip S. Polsky.)

I will be out of business in two or three weeks if this keeps up. Since the commencement of this trouble we have been forced to pay cash in advance for gasoline purchased.

Q. Now, Mr. Polsky, as a result of this breach of the contract, have any of your service station dealers made statements or threats with reference to commencement of suits?

Mr. ELVIDGE.—Objected to, Your Honor, as being hearsay, as well as incompetent, irrelevant and immaterial.

The COURT.—No, he may answer. Have you contracts with your sub-stations?

A. Yes, sir, we have.

The COURT.—And are you able to comply with the terms of those contracts?

A. No, sir, we are not able to.

The COURT.—Have any of these parties threatened you with suit for damages? [106]

A. Yes, sir.

The COURT.—For failure to furnish gasoline?

A. Yes, sir, they have.

Mr. ELVIDGE.—May I suggest this to Your Honor, that the proper testimony by the witness on that point would be to bring in those contracts themselves.

The COURT.—Well, you can ask him to bring them in, if you want them.

Mr. ELVIDGE.—I think before he testifies to them they should be here.

(Testimony of Phillip S. Polsky.)

The COURT.—They are merely incidental to the issue in this case.

Mr. ELVIDGE.—I move to strike the answer, Your Honor, on the ground——

The COURT (interrupting).—Denied.

Mr. ELVIDGE.—Exception.

Q. How long does your contract have to run, Mr. Polsky?

The COURT.—It speaks for itself.

Q. Now, Mr. Polsky, you have different contracts with different of your customers?

A. Yes, sir.

Q. As a result of any action on the part of the Shell Company, have a certain class of contracts been entered into with some of your customers?

Mr. ELVIDGE.—I object to that, Your Honor, because I think it is only fair to the defendant——

The COURT (interrupting).—The objection is sustained. He has already covered that fully in the answer to my question.

Mr. BAILEY.—An exception to the Court's ruling.

Q. Mr. Polsky, I hand you two blank contracts, which will be marked as Plaintiff's Exhibits "2" and "3," and ask you whether or not those are the form of contracts which you have used with one of your stations? [107]

A. They are.

Q. And at whose request?

A. The Shell Oil Company's request.

(Testimony of Phillip S. Polsky.)

Mr. ELVIDGE.—Object to it, if the Court please, at whose request they were entered into, unless the contract shows on its face.

Mr. BAILEY.—The contract shows on its face they were entered into between the Shell Oil Company and the——

The COURT (interrupting).—Let me make this observation: This is exactly the matter I think the Court ruled on a moment ago, and to come in now, after the Court has disposed of it——

Mr. BAILEY (interrupting).—I didn't want——

The COURT (interrupting).—If he wants those things he can ask to bring them in. But I am satisfied with the testimony that is already in.

Mr. BAILEY.—I withdraw the offer, and that is all.

Mr. ELVIDGE.—I move to strike his testimony.

The COURT.—You already did, and I denied it.

Mr. ELVIDGE.—On the ground the contracts are now produced, and show they are contracts between the defendant Shell Oil Company and other persons.

The COURT.—They are not in evidence.

Mr. ELVIDGE.—No, but his testimony is in evidence, Your Honor.

The COURT.—Well, suppose it is. The contracts are not in. There is nothing before the Court.

Mr. ELVIDGE.—An exception, if the Court please, to my request, Your Honor, that his testimony be stricken. [108]

(Testimony of Phillip S. Polsky.)

Cross-examination.

I bought approximately 500,000 gallons of 3-Energy gasoline from the Shell Oil Company during the month of August. I do not know how many I bought during July. I cannot say whether it was more or less. The actual volume of my business has not fallen off. Not last month over the month of July. I can't say whether July had fallen off over June.

When the contract was entered into I was purchasing Shell 400 Dry, which was the only gasoline that they had. When the Shell Oil Company came out with Super Shell they sold it to me. I did not know at the time that under the contract I was not entitled to it. Nor that they were letting me have it voluntarily. Under the clause in the contract reading.

> "It being further understood that the word 'gasoline' as used throughout this contract shall be construed to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude special refined or blended gasolines sold by it for special purposes at an increased price or prices." [109]

I was not entitled to Super gasoline but there was an oral modification. Then Shell Ethyl came out in place of Super Shell. They furnished me this gasoline, Super Ethyl, and modified the contract by add-

(Testimony of Phillip S. Polsky.)

ing it to the volume and calling it a part of the quota of the gasoline that I was receiving under the contract. They gave the new gasolines to me as fast as they came along without any question, but I believe there was a little question regarding Shell Ethyl. It requires a license. The jobber must have a license from the Shell Ethyl Corporation. And there was some question whether or not they could get it for me, and there was some negotiation, but, in any event, they gave it to me and made it a part of the quota of my gasoline allowance. There was no contention at any time that the subsequently developed gasolines were not within the terms of the contract until we came to Green Streak.

First we had Shell 400, which was the main brand they were marketing. Super Shell was a higher priced or premium product. In place of Shell 400 they put out 3-Energy. That takes the place of 400 and is known as first structure gasoline. Shell Ethyl was substituted for Super Shell. Up to the time they commenced to market Green Streak I never got more than two grades, the main grade and the premium grade. My estimate that we are selling one-third of the Shell gasoline sold in Seattle and Tacoma is based upon information given to me by Mr. Lakin and Mr. Harvey, officials of the Shell Oil Company.

My statement that they are selling Green Streak generally to the dealers is based upon this: Hour after hour I have spent driving around Seattle, at

(Testimony of Phillip S. Polsky.)

the direction of my salesmen, telling me where these different Shell accounts are located, and I have personally seen, I would say approximately 80 per cent of their 100 per cent business, that is, the 100 per cent business that has over one pump, with a Green Streak Shell gasoline pump in there. My information is based on a survey I had my sales department make. And a survey that I made personally.

A split pump dealer is one who sells Shell gasoline and likewise gasoline of other dealers. I found one split pump account with Green Streak. It was Munk on Ravenna Boulevard. I replaced our pump with it. [110]

The Shell Oil Company served me last February with notice of cancellation of this contract under the clause permitting cancellation upon twelve months' notice, so that under the terms of the contract and the cancellation notice the contract will expire February 29th of next year.

I sell between five and six hundred thousand gallons of gasoline in Seattle and Tacoma each month. The Shell 3-Energy is sold by me under the name of "Aviation Gasoline" at 2½¢ more than the price I pay for it. If they gave me my full commission I would make 2½¢. It averages today about a cent and a half per gallon. I have been making about 1½¢ per gallon for about six months. We have been selling "Skookum" at the price of 15¢. We sold our 3-Energy or Aviation under the name of

(Testimony of Phillip S. Polsky.)

Skookum at 15¢ and 16¢. I sold about 32% of my volume for the entire month of August this way. I am selling Skookum to about 10 or 12 split pump accounts, and Aviation to about 50 split pump accounts. We have forty-five 100% accounts in Seattle. About 75% or 80% of these accounts sell "Skookum." This would be, roughly, about thirty 100% stations that are selling "Skookum" gasoline in the City of Seattle. We have about thirty split pump accounts in Tacoma. In Tacoma last month we sold our first grade gasoline at a price competitive with third grade gasoline. We did not sell any under the name of Skookum in Tacoma. We are selling some now. In Tacoma we simply sold Aviation under the name of Aviation at a cheaper price, substantially all of it. We sold some for cash and some for credit.

Redirect Examination.

We have no difficulty in selling the first grade gasoline at the third grade price. Up to the time that Green Streak was placed upon the market the Shell Company sold me everything they had. Last month the price of Green Streak gasoline dropped 1¢ a gallon. [111]

TESTIMONY OF JOHN MURRAY FOR PLAINTIFF.

JOHN MURRAY, having been called by plaintiff as a witness, being first duly sworn, testified:

I am sales manager for the plaintiff. I have canvassed the Shell service stations in the City of Seattle to determine whether they are selling Green Streak generally and I find a general distribution. I had a photographer with me to take pictures of Shell Service Stations, Inc. Plaintiff's Exhibits "4" and "4-a" are pictures of Shell Service Stations, Inc., selling Green Streak gasoline.

Photographs referred to and marked Plaintiff's Exbihits "4" and "4-a" etc. received in evidence without objection and made a part of the record.

Plaintiff's Exhibits 5-a, etc., are a group of pictures of stations independent of the Shell Oil Company that are selling Green Streak gasoline. These photographs do not represent all of the Shell Service Stations, Inc., that are selling Green Streak gasoline. They are just a representative group.

At this point Plaintiff's Exhibits 5-a, etc., were offered and admitted in evidence without objection.

It is very necessary for a service station to have either Green Streak or a third structure gasoline or a gasoline selling at a third structure price to be competitive. The general trend of the buying public is to purchase gasoline for as low a price as possible. It is necessary to have all grades to carry on a general gasoline business.

(Testimony of John Murray.)

Q. Mr. Murray, as sales manager of the Independent Petroleum Company, have you tried in the last two months to secure new business?

A. Yes sir.

Q. What has been your success?

Mr. ELVIDGE.—Objected to as being immaterial, irrelevant and incompetent. [112]

The COURT.—I think the question may be answered.

Mr. ELVIDGE.—Exception.

A. Due to the fact that our delivery of third structure gasoline has been very indefinite, and that we couldn't positively guarantee it, it has been very difficult to secure new business, owing to that fact.

The COURT.—Why was the delivery indefinite?

A. Because we had no third structure gasoline, and we were not sure we could continue to sell our regular gasoline at third structure prices, in the event that price dropped considerably lower than it is at the present time, could not guarantee it.

At this point plaintiff's Exhibit "6" was offered in evidence and admitted without exception.

In general the majority of split pump accounts in Seattle are selling some brand of third structure gasoline.

Cross-examination.

I do not know whether there are any independent dealers in Seattle and the Northwest that are not

(Testimony of John Murray.)
handling Green Streak at all. I am not aware that over 60% of the independent 100% dealers of the Shell Oil Company in Seattle do not handle Green Streak. To my knowledge at the present time the split pump accounts of the Shell Oil Company do not handle Green Streak gasoline.

PHILLIP S. POLSKY, recalled for further cross-examination, testified as follows:

Under my contract we were selling about 400,000 gallons of gasoline a month.

TESTIMONY OF H. F. RIPPEY, FOR PLAINTIFF.

H. F. RIPPEY, having been called by plaintiff as a witness, being first duly sworn, testified:

I am chief chemist for Laucks Laboratories, Incorporated of [113] Seattle, and have been for over five years. I examined and analyzed Green Streak gasoline and Shell 3-Energy gasoline, both of which are motor gasolines for internal combustion engines. The gasoline which I analyzed I bought from the Shell Service Inc. Station No. 706 in this City. The Green Streak gasoline was found to be slightly inferior in quality, due to having a higher boiling point, a higher dry point. The specific gravity of the Shell 3-Energy was

(Testimony of H. F. Rippey.)

slightly higher than that of the Green Streak. The boiling point of the 3-Energy was 96 degrees Fahrenheit, that of the Green Streak 102 degrees Fahrenheit. The dry point of Shell 3-Energy was 402 degrees Fahrenheit as against 418 degrees Fahrenheit for the Green Streak. There was very little difference, except in the fractions of ten, twenty, thirty per cent fractions. They are substantially the same. Green Streak is a slightly lower quality gasoline. Green Streak and Shell 3-Energy are both automotive fuels.

At this point the analysis of the witness was offered and admitted in evidence without objection as Exhibits Nos. 7 and 8.

Cross-examination.

I did not analyze these gasolines to determine their anti-knock features. I just analyzed them to determine the specific gravity and the distillation range. The distillation range is the temperature at which fractions come off, not the temperature at which they boil.

Redirect Examination.

I gave them the standard STM I have of testing T gasoline. [114]

TESTIMONY OF E. W. DIETZ, FOR PLAINTIFF.

E. W. DIETZ, having been called by plaintiff as a witness, being first duly sworn, testified:

I am collection manager of the retail department of the Shell Oil Company or Shell Service, Inc. There is no difference between Shell Service, Inc. and Shell Oil Company. It is all one. I operate 31 service stations in Seattle. All of them are selling Green Streak gasoline. We sell 3-Energy, Shell, Ethyl and Green Streak. Approximately 33% of the sales in August were Green Streak. In a six pump station at the corner of 3rd and Boyer we have two Green Streak pumps.

Cross-examination.

These stations which I mention are not dealer's stations of the Shell Oil Co. They are simply retail stations of the Shell Oil Company and the handling of gasoline there is simply a bookkeeping proposition.

TESTIMONY OF JACK KINGSLEY, FOR PLAINTIFF.

JACK KINGSLEY, having been called by plaintiff as a witness, being first duly sworn, testified:

I run a Shell Service Station of my own for the Shell Oil Co. I sell Green Streak gasoline. About 50% of our sales are Green Streak.

(Testimony of Jack Kingsley.)

Cross-examination.

I have a contract with the Shell Oil Company. Before I was permitted to handle Green Streak. They asked me to sign an acknowledgment that I was not entitled to it under my contract. I do not have the contract or waiver with me. [115]

TESTIMONY OF JAMES J. GEROS, FOR PLAINTIFF.

JAMES J. GEROS, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my own station and buy Green Streak gasoline from the Shell Oil Company. I have two pumps and sell Green Streak and 3-Energy. About 60% of my sales are Green Streak. It is necessary for me to have it to be competitive in the business.

TESTIMONY OF THOMAS BLAKER, FOR PLAINTIFF.

THOMAS BLAKER, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my own station and sell 3-Energy and Green Streak which I buy from the Shell Oil Company. 50% of my sales are Green Streak. I think we sell more gallonage by taking Green Streak. There is not a big demand for it, about 50%.

(Testimony of Thomas Blaker.)

Cross-examination.

I operate a Shell Service Station, Inc. I am just a salesman for the Shell Oil Company. The Company operates the station. I guess it is not a dealer's station.

TESTIMONY OF H. W. McCREERY, FOR PLAINTIFF.

H. W. McCREERY, having been called by plaintiff as a witness, being first duly sworn, testified:

I operate a Shell Station Inc. I work there on a percentage on the gasoline I sell at the station. I sell Green Streak, 3-Energy and Ethyl. About one-third is Green Streak.

Cross-examination.

The Shell Service operates my station. I am in there as a salesman on commission. I am not an independent dealer. [116]

TESTIMONY OF S. L. MOUAT, FOR PLAINTIFF.

S. L. MOUAT, having been called by plaintiff as a witness, being first duly sworn, testified:

I had an independent station. I buy 3-Energy and Green Streak from the Shell Oil Company. About one-third of the gasoline I sell is Green

(Testimony of S. L. Mouat.)

Streak. I have a contract in writing with the Shell Oil Company and before I was able to buy Green Streak I signed a waiver or acknowledgment under the circumstances which I sold it.

Redirect Examination.

I can get all the Green Streak I can sell.

TESTIMONY OF FRED CALL, FOR PLAINTIFF.

FRED CALL, having been called by plaintiff as a witness, being first duly sworn, testified:

I own the station. I sell 3-Energy and Green Streak. About one-third is Green Streak. I have no trouble in getting it from the Shell station in quantities.

Cross-examination.

I operate a Shell Service Station, Inc. The Shell has a lease on it and controls and operates it. I am simply in there as a salesman selling gasoline on commission. The station is not owned by the Shell Oil Company, but it is in and under their control and they put me in as a salesman under contract.

TESTIMONY OF H. G. ROSS, FOR PLAINTIFF.

H. G. ROSS, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my station and sell 3-Energy and Green Streak. About 40% of my sales are Green Streak. I find it necessary to have Green Streak in order to be competitive. [117]

Cross-examination.

I am an independent dealer. I have not turned the property over to the Company.

TESTIMONY OF FRED SAXE, FOR PLAINTIFF.

FRED SAXE, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my own station and sell all three brands of Shell gasoline, Ethyl, 3-Energy and Green Streak. I have no trouble in getting any of the gasoline from the Shell Oil Company. I pay cash for the Green Streak.

TESTIMONY OF D. HUGHES, FOR PLAINTIFF.

D. HUGHES, having been called by plaintiff as a witness, being first duly sworn, testified:

I lease my station from a private owner and sell Green Streak, 3-Energy and Ethyl gasoline. About one-third is Green Streak. I find it necessary to have Green Streak to be competitive.

Cross-examination.

I pay cash for Green Streak, and before I got it I had to sign an acknowledgment.

TESTIMONY OF DICK SMITH, FOR PLAINTIFF.

DICK SMITH, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my station, but I have leased it to the Shell Oil Co. I sell Ethyl, 3-Energy and Green Streak. Between 40% and 50% of the total is Green Streak. I find it necessary to have it to be competitive.

Cross-examination.

I am an independent dealer on a contract, and before I was permitted to buy Green Streak I had to sign an acknowledgment. I paid cash for it. [118]

TESTIMONY OF W. D. MONK, FOR PLAINTIFF.

W. D. MONK, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my own station. I sell 3-Energy and Green Streak. About one-third is Green Streak and I find it necessary to have it to be competitive. There was a demand for it. I lost lots of business before I had it. I don't have Ethyl.

Cross-examination.

I am an independent dealer on a contract and before I was permitted to have Green Streak I had to sign certain acknowledgments. I pay cash for all the Green Streak.

TESTIMONY OF WILLIAM GEDDINGS, FOR PLAINTIFF.

WILLIAM GEDDINGS, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my own station. I sell 3-Energy and Green Streak. About 50% of the sales is Green Streak. There is a big demand for it. It is necessary for me to have it in order to be competitive. I have no trouble in getting all I want from the Shell Oil Company.

(Testimony of William Geddings.)

Cross-examination.

I am an independent dealer and have a contract with the Shell Oil Company. Before I could get Green Streak gasoline I had to sign certain acknowledgments and pay cash for it.

TESTIMONY OF ED THOREN, FOR PLAINTIFF.

ED THOREN, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my own station but it is leased to the Shell Oil Company. I sell 3-Energy, Ethyl and Green Streak. About 20% of sales are Green Streak. I have no trouble in getting as much as I want. [119]

Cross-examination.

The station I operate is a Shell Service, Inc. station. I have leased it to the Shell Oil Company and they operate and control it. I have nothing to do with reference to the policy of the station. I am simply in there as a salesman for the Shell Oil Company. I am not a dealer.

TESTIMONY OF A. L. SHELTRAW, FOR PLAINTIFF.

A. L. SHELTRAW, having been called by plaintiff as a witness, being first duly sworn, testified:

I am a split pump account.

Mr. BAILEY.—I have made a mistake. You step down.

TESTIMONY OF M. P. CLAUSEN, FOR PLAINTIFF.

M. P. CLAUSEN, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my own station and sell Green Streak and 3-Energy. About 20% of the sales is Green Streak. I have no trouble in geting as much as I want from the Shell Oil Company.

Cross-examination.

I am a dealer of the Shell Oil Company and own and operate my own station on contract. Before I could get Green Streak I had to sign certain acknowledgments and pay cash for the product.

TESTIMONY OF F. W. SCHROEDER, FOR PLAINTIFF.

F. W. SCHROEDER, having been called by plaintiff as a witness, being first duly sworn, testified:

(Testimony of F. W. Schroeder.)

I own my own station and sell Shell 3-Energy and Green Streak. About 20% of the sales is Green Streak. So far I have had no trouble getting as much as I want from the Shell Oil Company. [120]

Cross-examination.

I am under contract with the Company for the gas and before I could get gasoline I had to sign certain acknowledgments and pay cash for the commodity.

TESTIMONY OF A. BENDSTEN, FOR PLAINTIFF.

A. BENDSTEN, having been called by plaintiff as a witness, being first duly sworn, testified:

I own my own station and sell 3-Energy and Green Streak. About twenty-five or thirty percent of the sales are Green Streak. I find some demand for it. I have no trouble getting as much as I want. They give me all I can sell.

Cross-examination.

I am an independent dealer on contract with the Shell Oil Co. Before I could get this gas I had to sign certain acknowledgments that I was not entitled to it and that they could shut me off at any time. I pay cash for it.

DEFENDANT'S CASE.

TESTIMONY OF ALFRED J. MARSHALL, FOR DEFENDANT.

ALFRED J. MARSHALL, having been called by defendant as a witness, being first duly sworn, testified:

I am employed by the Shell Oil Company as assistant superintendent of the Martinez Refinery in charge of research and development at Martinez, California. I am a qualified chemist and it is part of my duties to analyze the different brands of gasoline that are being manufactured and distributed from time to time by the Shell Oil Company. Shell Ethyl is a highly volatile material which has been compounded with petroleum products to have an anti-knock quality for use in high compression motors. 3-Energy is a material that has not been compounded with any petroleum product but is blended to have a high anti-knock quality, and to be a high volatile [121] gasoline for efficient service in automotive engines. Green Streak is manufactured to have the minimum quality recognized by the United States Government as coming under the classification of motor gasoline. The two fundamental requirements of gasoline are volatility and anti-knock quality, and on volatility, the Green Streak is at least ten degrees Centigrade lower boiling than the 3-Energy, which means that it will give more difficulty starting in the motor, slower warming up, and even reduced power. The anti-knock quality also differs very appreciably, which

(Testimony of Alfred J. Marshall.)
also has an effect upon the car and upon the comfort of driving. Green Streak gives rough driving, rather rough—the car feels much rougher driving on Green Streak than driving on 3-Energy; a much smoother flow of power on the 3-Energy gasoline.

The anti-knock quality of gasoline is to determine on a special research engine, by a committee of the Petroleum Institute and the automotive industry, called C. F. I. engine, and we express the anti-knock quality of a gasoline by a blend of pure substance called octane and heptane, so the blend is found equal to the gasoline in the test, and the percentage of octane in that blend is known as the octane number gasoline.

The Green Streak runs to a maximum of octane number of 60, and the 3-Energy runs to a maximum of 75, a mean of 73; 60 and 75 are the two maximum figures. That means that the Green Streak is never better than a mixture of 60 parts of octane or 40 parts of heptane. High octane is a pure octane of very high quality, and heptane is a substance of very poor anti-knock quality, and we blend the two to make our fuels in testing gasoline. In operating the car with Green Streak as compared with 3-Energy or Shell Ethyl the first difference is that on a gasoline of low octane number you will notice the car knocking, you hear a rattling noise under the hood of the motor on driving up a hill, especially at low speeds, or on trying to accelerate rapidly on high gear from a slow speed. [122]

(Testimony of Alfred J. Marshall.)

With a higher octane number that condition will be very much less marked, and if the car—there are many cars which would give you the knock on the Green Streak that would not give you the knock on the 3-Energy. There are cars which will give you the knock on both, but in that case the 3-Energy would not be very much less than Green Streak.

The second observation is that that knock is accompanied by a loss of power.

It means a much too rapid explosion of efficiency and the explosion is trying to punch the piston instead of giving it a push. It takes a much more quantity to obtain the particular service. It is exerting the same energy, but exerting it in the form of a blow instead of a push. A dissipation of energy. Energy is wasted in the form of heating, which enters into the jacket temperature and overheats the motor instead of pushing the pistons down, and therefore pushing the car along. The most extreme observation that can be made is that the overheating of the motor, about which I spoke, will proceed until blowing parts of carbon will ignite the charge before the piston rods top dead center, and the explosion will actually try and push the engine around backwards, and that makes a very unpleasant noise, and will practically stall the engine. It is not a very common condition in motor cars; it is a very common condition in motorcycles. I have had it happen to motorcycles, but it is not very common in automobiles. The result of the

(Testimony of Alfred J. Marshall.)

difference between the two is difficulty in starting. The loss of power, slowness in warming up, and loss of power when pulling. The United States Government or Federal Specification Board, has drawn up a specification which they call "U. S. Gasoline," representing the minimum quality of gasoline. It does not include an octane number, but as far as volatility is concerned it represents the minimum volatility which the Federal Specifications Board requires [123] as being satisfactory for general motor operation. And this Green Streak gasoline is manufactured to meet that specification, and actually has very little to spare—really just under the limit of that specification to have it satisfactory to meet the specification. We increase the yield of the gasoline from the crude, Your Honor, which makes it cheaper to manufacture, and also the 3-Energy is specially blended and specially treated to improve its quality as well. Much more money is spent on it. Instead of reducing the price of 3-Energy we reduced the quality of gasoline and get Green Streak. It is all motor gasoline.

Green Streak will tend to increase the carbon formation chiefly because it has heavy ends in it which will dilute the lubricating oil, and, therefore, form more carbon.

Cross-examination.

Ethyl is the highest grade, 3-Energy is next and Green Streak is the poorest grade. They are all being made for automotive transportation.

(Testimony of Alfred J. Marshall.)

Q. This Green Streak is being sold generally up and down the Coast, is it not?

A. As far as I have seen.

Q. You have come from California?

Mr. ELVIDGE.—Not proper cross-examination.

The COURT.—Not proper cross-examination.

Mr. ELVIDGE.—And objected to on that ground.

Mr. BAILEY.—That is all.

TESTIMONY OF PAUL E. LAKIN, FOR DEFENDANT.

PAUL E. LAKIN, having been called by defendant as a witness, being first duly sworn, testified:

I am assistant Division Manager of the Shell Oil Company, in charge of sales. My supervision covers the State of Oregon, Washington, Idaho, Montana and the Province of British Columbia.

The Company commenced to market Green Streak in the Northwest about July 2nd of this year. The purpose is this: We have Shell Ethyl, which is distributed by ourselves, and is primarily distributed through service stations, for use in cars that require a gasoline of high anti-knock quality; as a rule, cars with high compression. 3-Energy is a gasoline that has also a high anti-knock quality, quick starting features, good mileage features. It

(Testimony of Paul E. Lakin.)

is a balanced fuel, one that will perform in any make of automobile, and in practically any make of combustion motor, and will meet the requirements of the trade. [124] Green Streak is an old fashioned gasoline that has indifferent starting qualities, is not high in anti-knock qualities, does not accelerate quickly and readily, and will just get by. We market Green Streak in order to meet competition in certain parts where gasolines are sold at a lower price. We do not desire to sell Green Streak; we desire to forward the sale of 3-Energy. In cases where we sell Green Streak, we sell it for cash. We sell it where we feel that competition justifies it, and where we feel we have control of the distribution of Green Streak. If a dealer has a contract, we insist that he sign a waiver——

Mr. BAILEY (interrupting).—I object, Your Honor.

The COURT.—Objection sustained.

Mr. ELVIDGE.—I submit, Your Honor, this is one of the limitations upon the sale of the product for the purpose of showing it is not sold generally.

The COURT.—No.

Mr. ELVIDGE.—May I ask to have these three sheets of paper marked as an exhibit?

Q. Mr. Lakin, I am handing you Defendant's Exhibit "A," consisting of three sheets of paper, and will ask you what those are.

(Testimony of Paul E. Lakin.)

A. This is a waiver that is used where the dealer has a contract, and before we will sell him Green Streak he must sign this waiver.

Mr. BAILEY.—I object to any further proceeding on the ground it is just a self-serving declaration. The question at issue is not what is signed, but what is done.

Mr. ELVIDGE.—I desire to offer these in evidence, if the Court please.

The COURT.—Ruling reserved.

(Sheets referred to marked Defendant's Exhibit "A," ruling on the admission of which is reserved.)

[125]

The purpose in manufacturing Green Streak was to have gasoline available in those areas wherever gasolines were being sold at cheaper prices.

Just about the time we commenced to sell Green Streak there was a conference in Portland at which Polsky was present, concerning the matter of selling Green Streak to the plaintiff. Briefly, the matter of Green Streak was discussed, and the matter of developing possibilities for the Independent Petroleum handling Green Streak. These possibilities were discussed. In fact, it was suggested by Mr. Polsky that if arrangements could be effected whereby Green Streak could be handled by him, he would consider waiving certain features of his contract, namely, the commission under which he operates, and the matter was discussed in detail. But after discussing it with him and then with Mr. Miller,

(Testimony of Paul E. Lakin.)

our vice-president, it was found very difficult for us to effect a plan that would enable us to bring that about and still have control of distribution. Mr. Polsky wanted Green Streak and we took the position he was not entitled to it under his contract and at all times insisted upon it. There was some little detail there in connection with commission, and the fact that possibly if an arrangement was effected whereby he would distribute Green Streak, he would only distribute it to his 100 per cent. accounts and not to his split pump accounts. That was all a matter of discussion.

Our dealer trade consists of split pump accounts and 100% who purchase and resell gasoline who either own their own premises or who lease the service stations and the equipment from some owner and operate in that manner. Some cases they operate under contract with us and some cases not.

We do not sell Green Streak gasoline generally to our dealers. In the Seattle area, which includes Richmond Beach, and which is the area in which the Independent Petroleum operates, about 28% of [126] our dealers purchase Green Streak. We do not sell it to any of the split pump accounts. We do sell it to some of the 100% dealers.

Q. Before you will sell it to a 100 per cent. dealer, what conditions do you exact from him?

Mr. BAILEY.—I object to that, Your Honor, on the ground that is not proper examination, and has no bearing on the case.

(Testimony of Paul E. Lakin.)

The COURT.—The objection will be sustained, unless it goes to show that Mr. Polsky knew about this.

Q. Did Mr. Polsky know the circumstances under which you were selling it, and intended to sell it? Did you tell him at the time of the conference?

The COURT.—At the time the contract was entered into?

A. At the time the contract was entered into, we didn't handle Green Streak.

Mr. ELVIDGE.—This is a product not covered by the contract, Your Honor. We show it is not sold generally to our dealers, does not come within the contract.

Even assuming that a dealer wants this product and is willing to take it under any terms that we lay down, we will not sell it to him. There may be many cases where we did not desire to sell it. There might be certain areas where we did not desire it to be distributed. There may be certain dealers we would feel it inadvisable to give Green Streak to, regardless of their willingness to meet our requirements. This is because in order to market properly, it is entirely necessary that we handle the distribution of Green Streak carefully, otherwise it could upset our market generally. Substitution could occur.

We have 122 dealers in the area of Seattle and Richmond Beach who are 100% accounts and 48 split pump accounts. We are selling [127] Green

(Testimony of Paul E. Lakin.)

Streak to 39% of the 100% accounts and none of the split pump dealers.

I do not think it necessary for a dealer to have third structure gasoline, such as Green Streak, in order to successfully operate his station and meet the demand of the public. 61% of our 100% dealers who are operating without Green Streak are doing a satisfactory business in the Seattle-Richmond Beach area and they have no third structure whatsoever. We do not sell Green Streak to any of our split pump accounts, and they are able to maintain sales of 3-Energy. The plaintiff has purchased under his contract up to the present time since December 15th, 1931, 3,200,000 gallons of gasoline. The limit he may purchase for any one year, figuring from December 15th to December 15th, is 400,000 gallons. On an average during the past year he has purchased between 350,000 and 400,000 gallons per month.

Cross-examination.

I think most of all the major companies have placed upon the market a grade of gasoline in structure similar to Green Streak. We have different methods of outlet for our gasoline. One of the outlets is 31 service stations known as Shell Service, Inc. To the best of my knowledge all of those stations sell Green Streak. Another outlet is the Independent Petroleum. The Independent Petroleum has, not to my knowledge sold any Green

(Testimony of Paul E. Lakin.)

Streak except that it obtained under the injunction. Generally I am familiar with most of the service stations in Seattle and King County selling gasolines for the Shell Oil Company. 61% of the 122 100% accounts are not selling Green Streak. 39% are. I am not including Shell Service, Inc., stations in that. The 31 Shell Service, Inc., stations are distributing more or less in strategic locations around the city. Including the 31 stations we have a total of 217 accounts. Out of that 217 94 handle Green Streak. That includes those represented by the [128] photographs. Out of this figure of 217 pumps, I would estimate and approximate that there are between 25 and 30 one-pump stations, and that 48 are known as split pump accounts. A split pump account sells gasoline of any wholesaler and I can't say whether or not it is a fact that every one of these 48 split pump accounts handle a grade of third structure gasoline sold by another company.

The 122 100% accounts sell nothing but Shell gasoline and the additional 31 Shell Service, Inc., accounts sell nothing but Shell gasoline. I would like to correct you in the area under discussion. There are 47 Shell Service, Inc., accounts. To figure 31 is just within the city limits of Seattle. The 47 Shell Service, Inc., accounts are handling 100% Shell products. They all handle Green Streak, Shell Ethyl and 3-Energy. Including the 47 Shell, Inc., accounts we have a total of 169 100% accounts. This includes the one-pump stands and it is my best judg-

(Testimony of Paul E. Lakin.)

ment that there are 25 or 30 of these. This is an estimate which is all that I can do. Accepting the estimate of 30 making the proper deduction, leaves 139 100% stations having two or more pumps. I can not give the percentage of these that are selling Green Streak gasoline. I have not worked that out. I will prepare and give you the percentage of 100% stations of two or more pumps, including Shell Service Stations, Inc., that are handling Green Streak gasoline.

Q. You have stated, upon your examination in chief, that you did not think it was necessary for a station to have Green Streak gasoline to be competitive, is that a fact?

A. That's right.

Q. If that is the situation, why is it that you, in charge of the sales, have Green Streak for sale in every one of the company's stations, owned and controlled?

A. Simply because the Green Streak that is located in the company stations, owned and controlled, is directly under our control, which is the only manner in which we can allow Green Streak to prevail.

Redirect Examination.

We have 120 dealers in Seattle and Richmond Beach, of which 47 are purchasing Green Streak. The Shell Service, Inc., stations are not dealer stations.

(Testimony of Paul E. Lakin.)

Q. Now, having a single pump account as counsel has been talking about, Mr. Lakin, there is no single pump account that can buy Green Streak gasoline, is there, in Seattle or Richmond Beach?

A. None in Seattle or Richmond Beach at the present time. [129]

TESTIMONY OF DONNELL G. FISHER, FOR DEFENDANT.

DONNELL G. FISHER, having been called by defendant as a witness, being first duly sworn, testified:

I am division manager of the Shell Oil Company and my supervision extends over the Northwest, north of the California line, embracing Oregon, Washington, Montana, Idaho and British Columbia. I have been division manager almost twenty years.

Our first trade brand was Shell gasoline, then later we had, for advertising purposes, Shell 61, then later on, for advertising purposes, we changed the name as the gasoline was improved, and then called it Shell 400. When that had run out with the public, as far as advertising was concerned, we saw fit to again change the name, and today it has the pleasant name of Shell 3-Energy. It has been substantially the same gasoline all the time. It has been improved from time to time as our chemists have been able to do so.

(Testimony of Donnell G. Fisher.)

After this contract with the plaintiff was entered into the Company commenced to sell a Super Shell. There was some controversy with Mr. Polsky as to whether he was entitled to this under his contract and whether he could get it.

The reason that he wanted the Super Shell was because we did not handle Ethyl, and it was his statement that in order to satisfy his trade and retain certain of his accounts he must have a premium fuel, which was Ethyl. And we did not handle Ethyl at that time. The company preferred not to handle Ethyl. For that reason they made up their own, called Super Shell, which was a gasoline made to match Ethyl.

We did not care to give it to Mr. Polsky for several reasons, but finally, after much argument, we consented that we would let him have it, but that had nothing to do with the contract at all, was merely a day to day matter.

A. He was marketing everything under a brand called "Aviation" and we preferred not to have the name Shell in any way in that [130] name, so it would not be confused, and for that reason we hesitated about letting him have a brand of gasoline that had the word "Shell," for the reason it would naturally be of advertising value to him, and would tie in his product as that of being Shell.

Q. Was there any conversation between you as to whether he was entitled to the product or not entitled to the product under the contract?

(Testimony of Donnell G. Fisher.)

A. Well, there was a great deal of argument at that time. I can't remember just now exactly the nature—I won't say the nature of the argument, exactly what words were used, but we had a good deal of argument back and forth as to whether or not he should have the Super Shell.

Q. What took place when the so-called Shell Ethyl came out, or what is Shell Ethyl?

A. Well, the Ethyl gasoline is controlled by the Ethyl Corporation. They grant franchises. And after we had had Super Shell on the market for some little time as a competitor here, it was found advantageous to go with the wind rather than make our own, and for that reason we did take a franchise with the Ethyl Corporation.

Q. And did the company——

A. (interrupting). Pardon me just a moment, sir. One other reason was that the Ethyl brand of gasoline is a highly advertised brand of gasoline, that is, the Ethylizing of it, and it was felt that we could benefit by the national advertising that the Ethyl Corporation was giving it and we might as well go right along with the wind.

The COURT.—Good business judgment?

A. I think so.

Q. And when the Shell Ethyl came out, then was there any conversation or controversy between you and the Independent Petroleum as to whether he was entitled to the Shell Ethyl under his contract, or whether you were just giving it to him

(Testimony of Donnell G. Fisher.)

by reason of bargain, or [131] for any other reason?

A. Well, I think it was very, very clearly put to Mr. Polsky——

Mr. BAILEY (interrupting).—Just what was said?

A. I don't remember the exact conversation, sir.

Q. Well, what was the substance of it?

A. That he couldn't have it.

Q. That he was not entitled to it under his contract?

A. That he was not entitled to it under his contract, and that he couldn't have it. Then later we gave in and let him have it as a day to day proposition.

Q. A day to day proposition?

A. Yes sir.

Q. Well, what do you mean by that?

A. Well, what I mean by that is that it had nothing to do with the contract, and we let him have it, and could shut it off at any time we didn't care to sell it.

We did not supply him for a while and after a while we gave in and did supply him. I have warned Mr. Polsky time and time again that he was doing too much business, and advised him to cut it down; that he had a certain maximum in his contract.

(Testimony of Donnell G. Fisher.)

Cross-examination.

Regardless of our conversation we furnished him Super Shell in limited amounts. Plaintiff's Exhibit "10" is a letter signed by me bearing my signature.

At this point Plaintiff's Exhibit "10" was offered and admitted in evidence without objection.

We are furnishing Super Shell to him now. When Shell 3-Energy came out, we furnished it to him with the warning not to sell too much, he would get beyond his contract limitations. He was entitled to it; his contract provides for it. It was our main product which the contract covers. When Green Streak gasoline was placed upon [132] the market we refused to let him have any.

TESTIMONY OF E. L. MILLER, FOR DEFENDANT.

E. L. MILLER, having been called by defendant as a witness, being first duly sworn, testified:

I reside in Berkeley, California, and am vice-president, in charge of marketing the Shell oil, and president of the Shell Service, Inc. I have been connected with the Shell Oil Company eighteen years. I recall the conference in Portland a few weeks ago at which Polsky was present with reference to whether he could get Green Streak gasoline.

I think it was about July 1st. I had made a

(Testimony of E. L. Miller.)
trip through the Northern territory, and while here we came to the decision to put Green Streak, or our third brand of gasoline, on the market. And Mr. Polsky met Mr. Lakin and myself in the Portland Hotel in Portland during the morning, and while there, he made the proposition that if we would allow him to have a third brand of gasoline that he would reduce the commission that he now received on his Aviation gasoline from two and a half cents a gallon to two cents a gallon on all gasoline.

We discussed it something like two hours, and Mr. Polsky asked me how he was going to be competitive with some of his competitors if he didn't have a third brand of gasoline. I told him I didn't have anything to offer on that score, that the contract did not provide for him to have third-grade gasoline, the same as I had told him on many instances before when he had seen me in San Francisco, and that ended the conversation, by my telling him that there was no way that I could see that we could give him a third brand of gasoline. I explained to him, which he already knew, I think, the reason we were putting out this third brand of gasoline was so that we would be competitive with some of our independent competitors. [133] The sales of our Shell gasoline were going down, while the sales of independent gasoline were going up, and it was self evident we had to put a product on the market that we could market in competition

(Testimony of E. L. Miller.)

with this inferior independent gasoline, and not destroy the value that we had been trying to build up for years on our Shell brand of gasoline.

I told him that I felt that none of the jobbers would get it because this gasoline was being put on the market to meet the competition of jobbers in a good many instances.

This Green Streak gasoline is not sold generally to dealers by the Shell Oil Company anywhere on the Pacific Coast.

Q. Just roughly, just what is the percentage, to what extent is it sold?

Mr. BAILEY.—Object to that, Your Honor. The question is, how is it sold here?

The COURT.—Answer it.

A. May I refer to figures?

The COURT.—What was that, again?

Mr. ELVIDGE.—I am asking him if it is sold generally anywhere to dealers on the Pacific Coast?

The COURT.—He may answer it.

A. Well, taking the Northern Division, which, as has been told, includes the states of Oregon, Washington, Idaho and Montana, and excluding Shell——

The COURT (interrupting).—We want this territory here of Seattle.

A. I can't give you the figures on that.

The COURT.—That is what we are interested in, the territory in which the plaintiff deals.

(Testimony of E. L. Miller.)

Mr. ELVIDGE.—It is my purpose to show it is not sold generally to dealers anywhere on the Pacific Coast, Your Honor.

The COURT.—We are only concerned with this district. [134]

Mr. ELVIDGE.—That may be true, Your Honor, but it might be a circumstance upon which Your Honor——

The COURT (interrupting).—Not a bit. Other elements enter into other territories.

Mr. ELVIDGE.—Well, I will show, Your Honor, that the same situation extends everywhere up and down the Pacific Coast.

The COURT.—I don't care to argue with you.

Mr. ELVIDGE.—Very well, Your Honor. Exception to Your Honor's ruling.

In my opinion it is not necessary for a dealer to have third structure gasoline in order to survive or conduct his station successfully. I make that statement based upon conditions up and down the Pacific Coast generally. It is based upon my observation of sales up and down the Pacific Coast. I am in touch with the sales conditions up and down the Coast.

Shell Service, Inc. stations are not dealers' stations. They are stations that are owned by the Shell Oil Company and operated as the Shell Oil Company's retail outlet and for the purpose of convenience we operate them under the name of Shell Service, Inc. The major portion of the build-

(Testimony of E. L. Miller.)

ings are owned, the ground of some of them we own, and some we lease. In some instances we lease a going station and put it under the Shell Service, Inc. chain. The Shell Service, Inc. is a department just the same as a lubricating or a fuel oil department. The supervisors for and managers for Shell Service, Inc. receive their salary each month from the Shell Oil Company on Shell Oil Company's checks. They are all the same concern, owned by the same parties and same interests but handled for convenience under different names.

On the 7th of May we came out with our new Shell 3-Energy gasoline and Shell Ethyl. A few days before that Mr. Polsky telephoned me, I believe from Seattle or Portland, I don't remember which— [135] I was in San Francisco—and he said, "Mr. Miller, they are not going to let me have colored Shell 3-Energy." I said, "No, that is right, we are going to let you have the same gasoline before it is colored." And he said, "What about Shell Ethyl?" "Well," I said, "the Shell Ethyl is controlled by the Ethyl Corporation. We have to find out whether we can let you have Shell Ethyl or not."

There was a subsequent conversation after I had received notice from the Ethyl Corporation that they did not like the Independent Petroleum Company's marketing methods and that they would not grant a license to the Independent Petroleum Co.

(Testimony of E. L. Miller.)
to market Shell Ethyl gasoline. I told Mr. Polsky that, but I do not recall what he said.

Cross-examination.

At the beginning we did not sell him Shell Ethyl. We are selling it to him now. I am President of the Shell Service, Inc. It is a separate corporation, incorporated under the laws of California. Shell Service, Inc. operates about 970 service stations. Practically all of them selling Green Streak. I understand there are 47 service stations in Seattle which Shell Service, Inc. operates. One of the reasons we put Green Streak on the market was because our Company had to compete with Standard, Union, Associated, Gilmore and the rest of the Companies that put on a similar structure. We could have stayed in business, even if we did not have that structure of gasoline, with all the other major companies selling it.

We have had negotiations from time to time to buy Mr. Polsky out. I think there was quite a considerable time before Green Streak was put on this market here. It is not my feeling that he is selling too much gasoline.

The COURT.—I would like to just ask this witness one question, in view of the statement you made in answer to Mr. Elvidge's question in relation to the Ethyl people on the method of dealing by the Independent Company. Was there a sort of understanding [136] between the companies that

(Testimony of E. L. Miller.)

these Independent people should be suppressed, that they did not want to give them permission to sell the Ethyl, and would not consent that they sell? Was there an understanding they ought not to be permitted to operate in a general way and obtain the privileges which usually go with that sort of thing?

A. Ethyl gasoline being a patented product, the Ethyl Corporation makes one of its requirements that the Ethyl gasoline, by whomever it is sold, must be sold at the full market price, and whenever they find it is not being sold at the full market price they reserve the right to cancel the license, and they take the attitude that when it appears to them that they will have to cancel any license after it has been granted, they prefer not to grant the license.

The COURT.—And there is no feeling by that company and these other companies against the Independent dealers, that they ought to be suppressed?

A. No.

The Independent Petroleum Company has never been granted a license to sell Ethyl, but they are selling it under our license.

Redirect Examination.

We have a license and have permitted them gratuitously to buy it from us and sell it. But they are not entitled to it under their contract.

(Testimony of E. L. Miller.)

Q. Just along that line, Your Honor, the license which the Shell Oil Company has to sell Ethyl gasoline is a license to sell to what persons, Mr. Miller, or what entities, we will say?

The COURT.—What does it require?

A. That we can sell Shell Ethyl to dealers and commercial accounts.

Q. Does the license permit you to sell to Jobbers?

A. It does not. [137]

Q. Such as the Independent Petroleum?

A. It does not.

Q. Does Mr. Polsky know that?

A. I told him.

At this point counsel for the defendant reoffered Defendant's Exhibit "A" and the following occurred:

Mr. ELVIDGE.—May I reoffer them at this time, Your Honor?

The COURT.—That would not help you any. The ruling would be the same still.

Mr. ELVIDGE.—Very well, Your Honor. Then I misunderstood Your Honor. Your Honor is reserving ruling until the conclusion of the case?

The COURT.—No, simply reserved, and I will dispose of it before it is closed, and I may not until I finally dispose of it.

Mr. ELVIDGE.—Very well. I would like to have the record show, then, we are continuing our offer of Defendant's Exhibit "A."

TESTIMONY OF A. C. GUSKE, FOR DEFENDANT.

A. C. GUSKE, having been called by defendant as a witness, being first duly sworn, testified:

I am Division Credit Manager of the Shell Oil Company and have been employed in that capacity for the past three years and seven months, and as such am familiar with the account of the plaintiff.

Q. Will you state briefly what the indebtedness of that company was to the Shell Oil Company on or about the middle of July of this year?

Mr. BAILEY.—I object to that, Your Honor, strenuously, on the ground that it has no bearing on this case, absolutely none whatsoever.

The COURT.—Account with whom? [138]

Mr. ELVIDGE.—I am asking him how much the plaintiff was indebted to the Shell Oil Company in the middle of July of this year.

The COURT.—Oh, no.

Mr. ELVIDGE.—The purpose of that, Your Honor, is this: We have pleaded affirmatively that the plaintiff is in default in this contract in that they have not paid cash for the gasoline. Now counsel is asking Your Honor to specifically perform this contract. Now, whether they are entitled to the commodity or not is one thing; whether they are entitled to specific performance is another thing. If they are themselves in default under their contract, and asking Your Honor for equitable relief, the court will be much more slow to grant equitable relief if they are themselves in default. This con-

(Testimony of A. C. Guske.)

tract provides, Your Honor, they must pay cash for all gasoline. I will show Your Honor, or I am going to try to show to Your Honor, by this witness, they are indebted in a large sum of money to the Shell Oil Company, and they have not been paying cash for their commodity, and they thus have not complied with their contract.

The COURT.—Let it go in.

Mr. BAILEY.—If the Court please, may I make a statement? The main reason for my objection is that this matter is in controversy, whether or not the Shell Oil Company owes the Independent, or the Independent owes the Shell Oil Company, in a case in the Superior Court, upon which the issues are joined, and it is noted for trial.

The COURT.—You expect to show, Mr. Elvidge, that the amount due is conceded to be due?

Mr. ELVIDGE.—Well, I don't know whether they will concede it or not.

The COURT.—I think they are admitting a certain amount that is due.

Mr. BAILEY.—We are not admitting a penny that is due.

Mr. ELVIDGE.—You do in the other case?

Mr. BAILEY.—I do not.

The COURT.—Well, we are not trying that issue now. [139]

Mr. ELVIDGE.—Under this contract they were supposed to pay cash. Now, I will say, Your Honor, they did not pay cash for this gasoline.

(Testimony of A. C. Guske.)

The COURT.—Why didn't you make them pay cash? Of course you can't now.

Mr. ELVIDGE.—Well, I offer to show by this witness, Your Honor, that over the objection of the Shell Oil Company, and over the objection from time to time, the plaintiff obtained gasoline without paying cash for it, and has not paid cash for it over a considerable period of time, and is indebted to the Shell Oil Company now, or was about the middle of July, in the sum of $7390.91, and is still.

The COURT.—Expect to show that he stole it?

Mr. ELVIDGE.—No.

The COURT.—You said over objection of the company?

Mr. ELVIDGE.—Yes.

The COURT.—Well, how did he get it?

Mr. ELVIDGE.—That is what I am going to show by this witness.

Mr. BAILEY.—That is what I am objecting to.

The COURT.—That is something a court of equity is not concerned about.

Mr. ELVIDGE.—I want to show whether the plaintiff is playing fair under his contract or not.

The COURT.—No. Objection sustained under the circumstances.

Mr. ELVIDGE.—Exception, Your Honor.

The COURT.—Unless you propose to show that the amount claimed to be due is indisputable.

(Testimony of A. C. Guske.)

Mr. BAILEY.—While we are waiting for this, maybe we can take the witness who is going to give us some figures.

Mr. ELVIDGE.—Yes.

The COURT.—Is that all, Mr. Elvidge?

Mr. ELVIDGE.—I think, Your Honor, that the defendant will rest at this time.

PAUL E. LAKIN, recalled, BY COUNSEL FOR PLAINTIFF for further cross-examination.

About 42% of the outlets or accounts we have that have two pumps or more, including Shell Service, Inc. do not handle Green Streak. That is to say, over 50% of our outlets are handling [140] Green Streak.

Referring to the photographs in evidence, some of those are dealer outlets and some are Shell Service, Inc. Those in the photographs, to the best of my knowledge, are all handling Green Streak.

DEFENDANT RESTS. [141]

The following numbered exhibits admitted in evidence and referred to in the within Bill of Exceptions, to wit:

Plaintiff's Exhibits "1," "6," "7," "8," and "10."

Defendant's Exhibit "A."

are printed in full herein; that all of said exhibits were offered and admitted in evidence, except Defendant's Exhibit "A," which was offered by the defendant, refused by the Court, and an exception allowed to the defendant.

Plaintiff's Exhibits "4-a-b-c" etc., and "5-a-b-c" etc. are, by the Court's order, forwarded direct to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California. [142]

PLAINTIFF'S EXHIBIT "1."

AGREEMENT entered into this 25th day of November, 1929, between SHELL OIL COMPANY, a California corporation, hereinafter referred to as Shell Company and INDEPENDENT PETROLEUM COMPANY, a Washington corporation, hereinafter referred to as Petroleum Company.

The Petroleum Company agrees to buy from the Shell Company and the Shell Company agrees to sell to the Petroleum Company on the terms and in the manner hereinafter set forth, all the gasoline for use and resale in the City of Seattle and its immediate and adjacent suburbs, which the Petroleum Company requires and deals in, said quantity not to be less than 1,200,000 gallons, nor more than 4,000,000 gallons in any one year, reckoning from December 15, 1929, and not less than 100,000 gallons, nor more than 400,000 gallons for any one month, reckoning from December 15, 1929, said quantities to be bought, received and paid for by

the Petroleum Company in a month or year as the case may be.

It is mutually understood and agreed that gasoline so bought from said Shell Company by said Petroleum Company, is to be Shell gasoline of the quality the Shell Company is at the time of delivery selling to its dealer trade generally in Seattle, Washington.

It being further understood that the word "Gasoline" as used throughout this contract shall be construed to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude all special refined or blended gasolines sold by it for special purposes at an increased price or prices.

As a material consideration for which this contract would otherwise not be given, the Petroleum Company hereby [143] agrees to enter into a lease with the Shell Company covering certain real property and equipment (together hereinafter called a plant) located and owned by the Shell Company in the City of Seattle and at such definite place and at such time as the Shell Company shall hereafter designate. Said lease shall be for the term and exist only as a part of this contract, so that if for any cause whatsoever the contract shall be terminated, the said lease shall likewise be rendered null and void and of no further force or effect. The Shell Company hereby agrees to fully equip said plant for the handling of petroleum products thereon, and the rental for said equipment and real

property shall be the sum of one hundred twenty-five (125) dollars per month, payable in advance on the first day of each month during the term of this contract; which sum the Petroleum Company hereby promises and agrees to pay.

The Petroleum Company hereby agrees, on said leased property and through said equipment thereon, to use only products supplied to it by the Shell Company, and a violation of this covenant shall render this contract and the above mentioned lease immediately terminable at the option of the Shell Company. In that event the Shell Company may, without any liability whatsoever, enter upon the leased premises and take possession thereof and of all equipment and appurtenances thereon.

Deliveries to the Petroleum Company shall be by: Pipe line direct from the Shell Company's Harbor Island installation at Seattle to the Plant hereinbefore referred to. The quantity of gasoline so delivered shall be determined by meter located on this pipe line based on a temperature correction at 60° Fahrenheit, using .00065 as the expansion coefficient per degree Fahrenheit. [144]

However, it is understood and agreed by the parties hereto that until such time as the Shell Company shall build and equip the above referred to Plant it will fill the Petroleum Company's tank trucks at the Shell Company's truck fillstands located in its Harbor Island installation yard.

The price for all gasoline delivered shall be six and one-half cents (6½¢) less than the Shell Com-

pany's tank wagon price for commercial gasoline as determined and posted at Shell Company's Harbor Island Installation. All gasoline is to be paid for in cash at the time of delivery.

On the date this contract is written, dealers in the City of Seattle are being priced at four cents (4¢) per gallon less than Shell Company's posted tank wagon price. Therefore, in naming a price to the Petroleum Company of six and one-half cents (6½¢) under the posted tank wagon price, it is the intention of the price paragraph next above that the Petroleum Company be given a margin of two and one-half cents (2½¢) per gallon under the prevailing price to dealers.

All deliveries hereunder are to be made subject to Federal, State, County, Municipal and Government taxes, laws and regulations covering or applicable to the transportation or delivery of gasoline and any additional cost to the Shell Company in making deliveries of said gasoline under this contract, because of any future taxes, laws, or regulations not now in effect, shall be borne and paid for by the Petroleum Company.

The Shell Company is not to be held liable for damages or delays occasioned by or arising from acts of God, enemy of the United States, blockade, revolution, invasion, war, perils of the sea, strikes or other labor disturbances, epidemics, stoppage or exhaustion, partial or total, of [145] petroleum wells, suspension or discontinuance of operation of refineries, interference of civil or military authori-

ties or total or partial failure of any of the usual transportation or delivery facilities by which gasoline is transported from the point of production to the place of delivery hereunder or by any other cause beyond the control of the Shell Company.

In the event that the Petroleum Company fails to accept delivery of, in any one month, as much as one hundred thousand (100,000) gallons of gasoline, the monthly minimum under this contract, the Shell Company shall have the option: 1. Of refusing to proceed further hereunder and sue for damages for breach of the entire contract; 2. of suing for damages for the failure to accept delivery and pay for the difference between one hundred thousand (100,000) gallons and the quantity accepted by the Petroleum Company during the month and; 3. of waiving the breach. In the event the Petroleum Company breaches any of the conditions or terms of this contract, the Shell Company shall have the right to treat the whole contract as broken and sue for damages therefor, forthwith. A waiver of one default shall not be construed as a waiver of any subsequent defaults.

The Petroleum Company agrees that it will not sell gasoline purchased under this contract to dealers or any other class of trade at a price less than the price at which the Shell Company is at that time making deliveries to dealers for that class of trade to which the Petroleum Company is making the sale.

The Petroleum Company agrees that it will not make delivery of gasoline to a service station or garage or other class of business being serviced by a competitive oil company in such manner as to interfere with the code of ethics as established by the American Petroleum Institute. [146]

The Petroleum Company further agrees that it will not make deliveries of gasoline to any service station or commercial account taking one hundred per cent of its requirements from the Shell Company, without first obtaining written authority from the Shell Company to make such deliveries.

The Petroleum Company further agrees that it will not make deliveries into a gasoline dealer's Shell pump located at any split pump dealer account, which is painted Shell colors.

The Petroleum Company further agrees that it will not sell lubricating oil to one hundred per cent dealers, split pump dealers, or any other class of trade where the account to whom the sale is made replaces in whole or in part its requirements of Shell lubricating oil.

The Petroleum Company further agrees that it will purchase all of its lubricating oil requirements from the Shell Company and will resell such lubricating oils under its own brand, which shall be distinctive and in no way similar to the brands used by the Shell Company.

The Petroleum Company further agrees that all pumps being serviced by the Petroleum Company

will carry distinctive advertising colors of the Petroleum Company, which shall not in any way be similar to those of the Shell Company, and that it will not allow any dealers taking deliveries from the Petroleum Company to change the painting or trade marks or identification in such a way as to correspond in any way with the colors, trade marks or identification of the Shell Company.

It is understood that the Petroleum Company will distribute gasoline to its accounts in equipment belonging to the Petroleum Company, which are properly painted and identified in Petroleum Company colors, which in no way [147] correspond to the colors of the Shell Company. It is further understood that these trucks will be operated and maintained by the Petroleum Company.

The Petroleum Company further agrees that it will sell and distribute gasoline purchased from the Shell Company without adulteration or coloring of any kind.

It is mutually understood and agreed that either the Shell Company or the Petroleum Company may terminate and cancel this contract on twelve months' notice to the other party, provided said notice may not be given prior to November 30th, 1930.

IN WITNESS WHEREOF, the Shell Oil Company has caused these presents to be duly executed on its behalf and the Independent Petroleum Company has caused these presents to be duly executed

on its behalf by its President and Secretary the day and year first herein written.

SHELL OIL COMPANY,
By H. R. GALLAGHER.
INDEPENDENT PETROLEUM COMPANY,
By PHIL L. POLSKY,
President.
By JAMES M. BAILEY,
Secretary. [148]

State of Washington,
County of King.—ss.

On this 25th day of November, 1929, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Phil L. Polsky and James M. Bailey, to me known to be the President and Secretary of the Independent Petroleum Company, the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of the said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] A. L. LEMCKE,
Notary Public in and for King County, residing at Seattle.

My commission expires May 7, 1932. [149]

PLAINTIFF'S EXHIBIT 6.

Admitted.

United States of America,
State of Washington, [Seal of State]
Department of State.

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, J. GRANT HINKLE, Secretary of State of the State of Washington and custodian of the Seal of said State, do hereby certify that the annexed is a true and correct copy of the Trade Mark GREEN STREAK filed by the Shell Oil Company of San Francisco, California as received and filed in this office on the 6th day of April, 1932.

IN TESTIMONY WHEREOF, I have hereunto set may hand and affixed hereto the Seal of the State of Washington. Done at the Capitol, at Olympia, this 24th day of August, A. D. 1932.

[Seal] J. GRANT HINKLE,
Secretary of State.
By A. M. KITTO,
Assistant Secretary of State. [150]

Compared W. N. G. O. M. L. C. C.
No. 4064; Aug. 23, 1932: TBH

APPLICATION FOR REGISTRATION OF TRADEMARK.

KNOW ALL MEN BY THESE PRESENTS: That the Shell Oil Company, a corporation organized and existing under the laws of the State of California and having its principal place of business at 100 Bush Street, City and County of San Francisco, State of California, has heretofore adopted and does hereby adopt the following trademark, term, device, design or form of advertisement and does hereby make application for the registration of said trademark in the office of the Secretary of State of the State of Washington, said trademark, term or form of advertisement being described as follows, to-wit:

The trademark consists of the words "Green Streak," as shown by the accompanying counterparts thereof, filed herewith, which are true and correct copies of said original.

The size and color of said trademark may be varied without changing the general form and wording thereof. The class of merchandise or goods to which this label, trademark, term or form of advertisement is appropriated and on which it is to be used is gasoline.

Your applicant has the right to the use of such label, trademark, term, device, or form of advertisement, and no other person, firm, association, union

or corporation has the right to such use, either in the identical form or in such near resemblance thereto as may be calculated to deceive.

SHELL OIL COMPANY,
By JOHN LAUDER,
Vice President.
By A. R. BRADLEY,
Secretary.

State of California,
City and County of San Francisco.

Subscribed and sworn to before me this 2d day of April, 1932.

(Notary Seal) JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 12th, 1933.

Filed for record in the office of the Secretary of State April 6, 1932, at 8:00 o'clock A. M.

J. GRANT HINKLE,
Secretary of State. [151]

PLAINTIFF'S EXHIBIT 7.

(Laucks Laboratories, Inc., Letter Head.)

Certificate

Laucks Laboratories, Inc.
314 Maritime Bldg.,
Seattle.

September 6, 1932.

Report No. 46317.

Independent Petroleum Company,
1407 Textile Tower,
Seattle, Washington.
Gentlemen:

We hereby certify that we have tested sample of

SHELL 3-ENERGY GASOLINE

purchased by Mr. H. F. Rippey at Shell Service, Inc., Station No. 706 at 14th and Jackson St., Seattle, Sept. 6, 1932, at 8:30 A. M., and we have to report as follows:

Specific Gravity @ 60° F. 0.7511
56.4° Baumé

Distillation:

% Off	Temperature
Boiling Point	96° Fahr.
10	138° "
20	170° "
30	204° "
40	244° "
50	270° "
60	293° "
70	319° "
80	344° "
90	372° "
Dry Point	402° "
34.0%	221° "
56.0%	284° "
93.0%	392° "
Recovery	98.0%
Residue	1.3%
Loss	0.7%

Respectfully submitted,
[Seal] LAUCKS LABORATORIES, INC.
HFR/DCW By H. F. RIPPEY. [152]

PLAINTIFF'S EXHIBIT 8.

(Letter Head of Laucks Laboratories, Inc.)

Certificate

Laucks Laboratories, Inc.
314 Maritime Bldg.,
Seattle.

September 3, 1932.

Report No. 46300.

Independent Petroleum Company,
1407 Textile Tower,
Seattle, Washington.
Gentlemen:

We hereby certify that we have tested sample of SHELL GREEN STREAK GASOLINE purchased by Mr. H. F. Rippey at Shell Service, Inc., Station No. 706 at 14th and Jackson St., Seattle, Sept. 2, 1932, at 4:00 P. M., and we have to report as follows:

Specific Gravity @ 60° F. 0.7585
55.1° Baumé

Distillation:

% Off	Temperature
Boiling Point	102° Fahr.
10	162° "
20	199° "
30	223° "
40	250° "
50	266° "
60	293° "
70	319° "
80	346° "
90	384° "
Dry Point	418° "
28.0%	221° "
57.0%	284° "
91.0%	392° "
Recovery	98.0%
Residue	1.4%
Loss	0.6%

Respectfully submitted,

[Seal] LAUCKS LABORATORIES, INC.

HFR/H By H. F. RIPPEY. [153]

PLAINTIFF'S EXHIBIT 10.

Admitted.

(Letter Head of Shell Oil Co.)
Shell Oil Company
Seattle

May 15, 1930.

Mr. P. Polsky,
Independent Petroleum Company,
Lloyd Building,
Seattle, Washington.
Dear Sir:

We are now stocking our depots with Super Shell gasoline preparing to have it available for deliveries to dealers Wednesday, May 28th, so that it will go on sale to the public Thursday morning, May 29th. We will have it at Willbridge, Tacoma, Richmond Beach and Harbor Island, and will be prepared to fill your trucks May 28th, so that you can deliver to your dealers ready to be on sale Thursday morning, May 29th.

The price is to be 3¢ above Shell 400.

We feel that this wonderful Super Shell anti-knock gasoline will be very helpful to you in that it will satisfy those dealers who have been desirous of obtaining a premium fuel. I would suggest that you have a talk with Mr. McLaren who will explain some of the selling points of Super Shell so that you in turn can inform your salesmen.

Very truly yours,

DGF:DX (Sgd) D. G. FISHER. [154]

DEFENDANT'S EXHIBIT A.

Offered Sept. 6/32. Ruling reserved.

(Letterhead, Shell Oil Company)
Seattle

Form 2.

Dear Sir:

We are about to commence the marketing of a third structure gasoline.

This will confirm our mutual agreement that if any of said gasoline is delivered to you by us, it shall not be deemed to have been delivered to you in pursuance of the gasoline agreement between us dated....., but for all of such gasoline which we may deliver to you, you will pay us in cash on delivery, our dealer net tank truck price for that grade of gasoline as posted on the date of delivery at our depot at....., including all Motor Vehicle Fuel Taxes. We reserve the right to decline to deliver any of said gasoline to you at any time.

Nothing herein contained shall be construed to impair the continued force and operation of the above-mentioned gasoline agreement or any supplement or modification thereof, but the same shall not be applicable to the delivery of third structure gasoline.

No third structure gasoline delivered by us to you shall be taken into consideration in computing the amount of any rental or other periodical payment payable by us under any lease, or other agreement, of whatsoever nature with you.

Please endorse a confirmation of your agreement with the foregoing on one copy of this letter, which is handed you in duplicate, and return to us the copy so endorsed.

Yours very truly,
SHELL OIL COMPANY,
P. E. LAKIN,
Asst. Division Manager.

Confirmed and agreed to [155]

.....

(Part of Defendant's Exhibit A)

Form 1 (Letterhead, Shell Oil Company)
Seattle.

Dear Sir:

We are about to commence the marketing of a third structure gasoline.

This will confirm our mutual agreement that if any of such gasoline is delivered to you by us it shall not be deemed to have been delivered to you on consignment in pursuance of the Consignment Contract between us dated ..... but for all such gasoline which we may deliver to you, you will pay us in cash on delivery, our dealer net tank truck price for that grade of gasoline as posted on the date of delivery at our depot at....., including all Motor Vehicle Fuel Taxes. We reserve the right to decline to deliver any of said gasoline to you at any time.

Nothing herein contained shall be construed to impair the continued force and operation of the

above-mentioned Consignment Contract or of any valid supplement or modification thereof, but the same shall not be applicable to the delivery of third structure gasoline.

No third structure gasoline delivered by us to you shall be taken into consideration in computing the amount of any rental or other periodical payment payable by us under any lease, or other agreement, of whatsoever nature with you.

Please endorse a confirmation of your agreement with the foregoing on one copy of this letter, which is handed you in duplicate, and return to us the copy so endorsed.

Yours very truly,
SHELL OIL COMPANY,
P. E. LAKIN,
Asst. Division Manager.

Confirmed and agreed to [156]

.....

(Part of Defendant's Exhibit A)

Form 3 (Letterhead, Shell Oil Company)
Seattle.

Dear Sir:

We are about to commence the marketing of a third structure gasoline.

This will confirm our mutual agreement that if any of such gasoline is delivered to you by us the price provisions of the sublease between us dated .....shall not be applicable thereto, but for all of such gasoline which we may deliver

to you, you will pay us in cash on delivery our dealer net tank truck price for that grade of gasoline as posted on the date of delivery at our depot at....., including all Motor Vehicle Fuel Taxes. We reserve the right to decline to deliver any of said gasoline to you at any time.

Nothing herein contained shall be construed to impair the continued force and operation of the above-mentioned sublease, or any valid supplement or modification thereof, but the same shall not be applicable to the delivery of third structure gasoline.

No third structure gasoline delivered by us to you shall be taken into consideration in computing the amount of any rental or other periodical payment payable by us under any lease, or other agreement of whatsoever nature with you.

Please endorse a confirmation of your agreement with the foregoing on one copy of this letter, which is handed you in duplicate, and return to us the copy so endorsed.

Yours very truly,
SHELL OIL COMPANY,
D. E. FISHER,
Division Manager.

Confirmed and agreed to
..... [157]

I hereby certify that the within and foregoing statement of the evidence in the above cause has been properly prepared and that the same is true

and complete and that it is the direction of this Court that the portion reproduced in the exact words of the different witnesses should be so reproduced, and I do hereby approve the same.

Done in open Court this 3d day of October, 1932.

JEREMIAH NETERER,
District Judge.

Service of within statement of the evidence this 22 day of Sept. 1932 and receipt of a copy thereof, admitted.

PEYSER & BAILEY,
Attorneys for Plaintiff.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division, Sep. 22, 1932. Ed. M. Lakin, Clerk. By S. Cook, Deputy.

[Endorsed]: Filed Oct. 3, 1932. Ed. M. Lakin, Clerk. [158]

[Title of Court and Cause.]

STIPULATION RE PRINTING OF RECORD.

It is hereby stipulated by and between the parties hereto, through their respective counsel, that there need not be printed in the printed record to be forwarded to the Circuit Court of Appeals the formal caption of the papers in said Transcript, save to set forth the designation or character of the paper

or instrument to be printed and that there may be omitted at the end of such paper, printing or order the formal certificate of filing other than the file mark and date of filing and signature of the clerk.

Dated at Seattle, Washington, this 19th day of September, 1932.

PEYSER & BAILEY,
Attorneys for Plaintiff.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 20, 1932. Ed. M. Lakin, Clerk. [159]

[Title of Court and Cause.]

STIPULATION FOR FORWARDING OF ORIGINAL EXHIBITS.

Whereas plaintiff's Exhibits 4A, B, C, etc., and 5A, B, C, etc. admitted in evidence at the trial of the above entitled cause and a part of the record herein, consist of a bundle of original photographs which are not readily copied and which may not be readily incorporated into the printed record herein;

Now therefore, BE IT STIPULATED by and between the parties hereto, through their respective counsel, that the said exhibits themselves may be forwarded and transmitted by the clerk of the District Court to the Appellate Court at San Francisco,

as a part of the record for the inspection of said court.

PEYSER & BAILEY,
Attorneys for Plaintiff.
HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 21, 1932. Ed. M. Lakin, Clerk. [160]

[Title of Court and Cause.]

ORDER.

And now, it being necessary and proper in the opinion of the Court;

It is hereby ORDERED that plaintiff's original exhibits 4A, B, C etc. and 5A, B, C etc. admitted in evidence at the trial of the above entitled cause, consisting of original photographs, and a part of the record herein, BE AND THE SAME ARE HEREBY ORDERED AND DIRECTED to be forwarded and transmitted by the Clerk of this Court to the Circuit Court of Appeals at San Francisco, for its inspection as part of the record herein.

Done in open Court this 21st day of September, 1932.

JEREMIAH NETERER,
District Judge.

O. K. as to form.
PEYSER & BAILEY.
Presented by
ELVIDGE.

[Endorsed]: Filed Sep. 21, 1932. Ed. M. Lakin, Clerk. [161]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME FOR PREPARING AND LODGING APPELLANT'S STATEMENT OF THE EVIDENCE.

It is hereby stipulated by and between the parties hereto through their respective counsel, that the defendant-appellant above named may have up to and including the 15th day of October, 1932, within which to prepare and lodge its Statement of the Evidence on appeal in the above entitled cause.

PEYSER & BAILEY,
Attorneys for Complainant.
HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendant-Appellant.

[Endorsed]: Filed Oct. 3, 1932. Ed. M. Lakin, Clerk. [162]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR PREPARING AND LODGING STATEMENT OF FACTS.

And now upon stipulation of the parties, and due cause therefor appearing,

IT IS HEREBY ORDERED that the defendant-appellant be and it is hereby granted time within

which to prepare and lodge a Statement of the Evidence on Appeal in the above cause up to and including the 15th day of October, 1932.

Done in open Court this 3d day of October, 1932.

JEREMIAH NETERER,
District Judge.

O. K.
PEYSER & BAILEY.

[Endorsed]: Filed Oct. 3, 1932. Ed. M. Lakin, Clerk. [163]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

Please prepare, certify and file in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to notice of appeal given by defendant in the above-entitled cause, a transcript, including the following records, papers and documents filed in your office in the above-entitled cause, to-wit:

1. The following portions of transcript of removal proceedings on removal from the Superior Court:

   a. Complaint;
   b. Exhibit to complaint (Contract);
   c. Petition for removal;

d. Order of removal;

e. Bond on removal.

2. Amended bill in equity, filed August 27, 1932.

3. Defendant's answer, filed August 31, 1932.

4. Plaintiff's reply, filed September 6, 1932.

5. Journal record of the trial.

6. Court's decision rendered September 7, 1932, filed September 8, 1932, including certificate that decision shall constitute court's findings.

7. Defendant's proposed findings with Court's certificate appended, filed September 8, 1932.

8. Exceptions to refusal to make defendant's proposed findings, filed September 8, 1932.

9. Exceptions to Court's findings, filed September 8, 1932. [164]

10. Decree.

11. Defendant's assignments of error, filed September 8, 1932.

12. Defendant's petition for appeal, filed September 8, 1932.

13. Order allowing appeal.

14. Appeal bond and order approving same, filed September 8, 1932.

15. Citation filed September 8, 1932.

16. Stipulation relative to captions.

17. Statement of the evidence.

18. Clerk's certificate of transcript on appeal.

19. Telegram from Clerk of the Circuit Court at Portland.

20. Supersedeas Bond.
21. This Praecipe.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Defendant.

Copy received Sept. 19, 1932.

PEYSER & BAILEY,
Attorneys for Appellee.

[Endorsed]: Filed Sep. 20, 1932. Ed. M. Lakin, Clerk. [165]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that this typewritten transcript of record, consisting of pages numbered from 1 to 165, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitutes the record on appeal herein from the Decree of said United States District Court for the Western District of Washington to the United

States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true, and correct statement of all expenses, costs, fees and charges incurred in my office or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit: [166]

Clerk's fees, (Act of Feb. 11, 1925) for making record, certificate or return, 398 folios at 15¢ per folio	$59.70
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
Total	$65.70

I further certify that the above cost of preparing and certifying record, amounting to $65.70 has been paid to me by the solicitors for the appellant.

I further certify that I transmit herewith the original citation in the above-entitled cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the said District Court at Seattle, in said District, this 10th day of October, 1932.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington.
By T. W. EGGER,
Deputy. [167]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 944

INDEPENDENT PETROLEUM COMPANY, a corporation,

Plaintiff,

vs.

SHELL OIL COMPANY, a corporation,

Defendant.

CITATION ON APPEAL.

The President of the United States of America to the above-named plaintiff, Independent Petroleum Company, and to Peyser & Bailey, its attorneys, GREETING:

You are hereby cited and admonished to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden in San Francisco in the State of California, within thirty (30) days from the date hereof, pursuant to notice of appeal filed in the Clerk's Office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Shell Oil Company, a corporation, is the appellant, and Independent Petroleum Company, a corporation, is the appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in said notice of appeal mentioned, should not be

corrected and why speedy justice should not be done to the parties in that behalf.

Done in open Court this 8 day of September, 1932.

JEREMIAH NETERER.
Judge.

Service of original and receipt of a copy admitted this 8 day of Sept., 1932.

PEYSER & BAILEY.

[Endorsed]: Filed Sep. 8, 1932. Ed. M. Lakin, Clerk. [168]

[Endorsed]: No. 6962. United States Circuit Court of Appeals for the Ninth Circuit. Shell Oil Company, a Corporation, Appellant, vs. Independent Petroleum Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 12, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6962

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

SHELL OIL COMPANY, a California corporation,
Appellant,

—vs.—

INDEPENDENT PETROLEUM COMPANY, a Washington corporation,
Appellee.

BRIEF OF APPELLANT

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Appellant.
IVAN L. HYLAND,
FORD Q. ELVIDGE,
MARY H. ALVORD,
of Counsel.

910 Dexter Horton Building,
Seattle, Washington.

Farwest Lithograph & Printing Co.

No. 6962

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

SHELL OIL COMPANY, a California corporation,
Appellant,

—vs.—

INDEPENDENT PETROLEUM COMPANY, a Washington corporation,
Appellee.

BRIEF OF APPELLANT

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HYLAND, ELVIDGE & ALVORD,
Attorneys for Appellant.
IVAN L. HYLAND,
FORD Q. ELVIDGE,
MARY H. ALVORD,
of Counsel.

910 Dexter Horton Building,
Seattle, Washington.

Farwest Lithograph & Printing Co.

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No. 6962

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

SHELL OIL COMPANY, a California corporation,
Appellant,

—vs.—

INDEPENDENT PETROLEUM COMPANY, a Washington corporation,
Appellee.

BRIEF OF APPELLANT

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

STATEMENT OF THE CASE

This is an appeal from a decree granting a mandatory injunction compelling specific performance of a contract to deliver gasoline. Appellant is an oil company, dealing generally in the manufacture and marketing of gasoline and other petroleum products on the Pacific Coast. Appellee is a jobber engaged in the business of buying gasoline from appellant wholesale and selling it to dealers.

On November 25, 1929, appellant and appellee entered into a written contract wherein and whereby appellant agreed to sell to appellee and appellee agreed to buy from appellant (R. 181):

> "All the gasoline for use and resale in the City of Seattle and its immediate and adjacent suburbs, which the Petroleum Company requires and deals in, said quantity not to be less than 1,200,000 gallons, nor more than 4,000,000 gallons in any one year, reckoning from December 15, 1929, and not less than 100,000 gallons, nor more than 400,000 gallons for any one month, reckoning from December 15, 1929, said quantities to be bought, received and paid for by the Petroleum Company in a month or year as the case may be."

The contract also provided that (R. 184):

> "All gasoline is to be paid for in cash at the time of delivery."

It also provided that either party might terminate and cancel the same on twelve months' notice to the other party (R. 187). Twelve months' notice of cancellation was given by appellant to appellee on February 28, 1932, so that the contaact will expire on February 28, 1933 (R. 137).

The parties dealt under this contract, substantial quantities of gasoline being sold and purchased by them respectively. On or about July 2, 1932, the appellant commenced the sale in limited quantities and under special circumstances of a cheap grade of gasoline popularly known as "Green Streak" or "Third Structure" gasoline. The appellant declined to sell and deliver this cheap grade of gasoline to appellee contending that it did not come within the contract. The contract provided with reference to the product covered by it as follows (R. 182):

> "It is mutually understood and agreed that gasoline so bought from said Shell Company by said Petroleum Company is to be Shell gasoline of the quality the

Shell Company is at the time of delivery selling to its dealer trade generally in Seattle, Washington.

"It being further understood that the word 'gasoline' as used throughout this contract shall be construed to mean gasoline of the character ordinarily sold by Shell Company to service station operators for motor vehicle operation and shall exclude all special refined or blended gasolines sold by it for special purposes at an increased price or prices."

It is the contention of the appellant:

1. That the product does not come within the contract in that Green Streak is not Shell gasoline of the quality the appellant is selling to its "dealer trade" *generally* in Seattle, Washington, and in that it is not gasoline of the character *ordinarily* sold by it to "Service Station Operators," and

2. That even if the product be within the contract it was not a proper case for the issuance of a mandatory injunction to compel specific performance of the contract.

Inasmuch as the first point involves largely a discussion of the evidence in detail, we will postpone a further statement of the case to the discussion under Heading I of this brief.

SPECIFICATIONS OF ERROR

The Learned Trial Court erred in:

1. Entering a decree in favor of appellee (Ass'ts I and LI; R. 81, 114).

2. Granting specific performance of the contract (Ass'ts I and LI; R. 81, 114).

3. Issuing a mandatory injunction (Ass'ts I and LI; R. 81, 114).

4. Finding as a Fact or Conclusion as a matter of law that:

(a) Green Streak was supplied to the trade (Ass't XXII; R. 95, 47).

(b) That no applications for Green Streak were denied (Ass't XXIII; R. 95, 47).

(c) The waiver required by appellant before a party could obtain Green Streak was immaterial (Ass't XXIV; R. 95, 47).

(d) The rule of ejusdem generis controls the meaning of the contract (Ass'ts XXV and XXVI; R. 96, 47).

(e) Shell Service, Inc., is a distinct entity and furnishing of Green Streak to it is a furnishing to a third party (Ass't XXVII; R. 97, 48).

(f) Appellee was a large company, built at a large expense and is of great value (Ass't XXIX; R. 98, 49).

(g) It was necessary for appellee to have Green Streak in order to meet competition (Ass't XXX; R. 99, 50).

(h) Appellee had outstanding contracts to supply Green Streak which it could not renew (Ass't XXXI; R. 99, 50).

(i) Appellee has practically exhausted its reserves and would have ceased operation in two weeks (Ass't XXXII; R. 100, 50).

(j) Plaintiff's legal remedy is not adequate (Ass'ts XXXIV and XXXV; R. 101, 51).

(k) Appellant should specifically perform (Ass't XXXVI; R. 102, 52).

5. Refusing to find that:

(a) The delivery of Super Shell and Shell Ethyl to appellee was with the knowledge on the appellee's part that he could not require it under the contract (Ass't XXXIX; R. 104, 135, 56).

(b) As follows (Ass't XLI; R. 107, 56):

"That on or about July 1, 1932, the defendant manufactured a grade of gasoline cheaper and inferior than and to the brand of gasoline known as 'Shell 3-energy,' which said cheap and inferior grade of gasoline was and is known as 'Green Streak;' that the said brand of gasoline was manufactured for a special purpose, to-wit, to meet the competition of other gasolines sold at a cheaper price than the brand of gasoline sold under the name of 'Shell 3-energy' and gasolines of other gasoline companies sold at approximately the same price as 'Shell 3-energy;' that defendant did not market and distribute, and is not marketing and distributing, the same generally to its dealer trade in Seattle, Washington, nor on the Pacific Coast, nor was it, nor is it, of the character ordinarily sold by defendant to service station operators for motor vehicle operation in Seattle, Washington, or on the Pacific Coast; that the defendant, at the time of the trial of the above entitled cause, had in the City of Seattle approximately forty-eight (48) split pump dealers, otherwise known as dealers who handle petroleum products including gasoline of other oil companies to which the defendant has refused, and continues to refuse, to sell the said 'Green Streak' gasoline, and the said split pump dealers cannot procure the same from the defendant; that the defendant had, at the time of the trial of the above entitled cause, approximately one hundred twenty-two (122) dealers in the City of Seattle handling Shell products exclusively known as 100% dealers, to only forty-eight (48) of whom the Shell Oil Company sold and delivered 'Green Streak' gasoline, and refused to sell and deliver the same to any of the other exclusive or 100% dealers, and the said other exclusive and 100% dealers could not procure the same from the Shell Oil Company; that before the Shell Oil Company would sell the said 'Green Streak' gasoline to said exclusive or 100% dealers, the defendant did require the said dealers to sign an acknowledgment, if the

said dealers were buying gasoline from the defendant by contract, that, (1) If any 'Green Streak' gasoline were delivered to them, it should be deemed to have been delivered to them in pursuance of the contract between the dealer and the defendant; (2) That the dealer would pay cash therefor on delivery; (3) That the defendant might decline to deliver any of said gasoline at any time; and (4) That the said delivery of 'Green Streak' gasoline should not be taken into consideration in computing the amount of any rental or other periodical payment payable under the contract in effect between the defendant and such dealer; that, at the time of the trial of the above entitled cause, the defendant sold gasoline to persons or gasoline vendors having a single pump on their premises for the dispensing of gasoline, but refused to deliver to the same any 'Green Streak' gasoline, and the said single pump persons or dealers could not procure the same from the defendant."

(c) As follows (Ass't XLII; R. 109, 58):

"That the defendant has refused to deliver the said 'Green Streak' gasoline to the plaintiff, and, in so doing, the defendant has acted pursuant to the terms of the above mentioned contract between the defendant and the plaintiff, and, in so doing, did not commit a breach of the above mentioned contract between the defendant and the plaintiff."

(d) As follows (Ass't XLIII; R. 110, 58):

"That for the purpose of protecting the trade name, reputation, standing, and marketability of the product known as 'Shell 3-energy,' the defendant has refused to sell 'Green Streak' gasoline under any circumstances to, or permit the same to be obtained by, any person or operator or dealer who might sell the same under the name of 'Shell 3-energy' gasoline, or in any other way permit it to be advertised or delivered so as to prejudice the trade name, standing, and marketability of said 'Shell 3-energy' gasoline.

(e) As follows (Ass't XLIV; R. 110, 59):

"That it is not necessary for a service station operator or dealer to have for the purpose of sale 'Green Streak' gasoline in order to successfully compete or meet the competition of other dealers or of other grades of gasoline."

(f) As follows (Ass't XLV; R. 111, 59):

"That by reason of the inability of the plaintiff to procure and purchase 'Green Streak' gasoline from the defendant, the plaintiff has not lost any business nor suffered any damage and will not lose any business or suffer any damage as a consequence thereof."

(g) As follows (Ass't XLVIII; R. 113, 61):

"That the defendant has not violated any of the provisions of its contract with the plaintiff herein."

(h) As follows (Ass't XLIX; R. 113, 61):

"That the plaintiff has not sustained any damage by reason of anything done by the defendant in the performance of the contract herein."

(i) As follows (Ass't L; R. 113, 61):

"That no emergency exists and the plaintiff is not entitled to any injunctive relief directing specific performance of the contract or for any purpose."

6. Permitting the witness Mr. Polsky to testify to loss or damage sustained by reason of the refusal to deliver Green Streak (Ass'ts VI to IX inclusive; R. 86, 127, 131).

7. In permitting the witness Polsky to testify that demands had been made upon him by operators and dealers for delivery of Green Streak (Ass't X; R. 89, 132).

8. In permitting the witness Polsky to testify that he

had contracted to sell Green Streak to operators or dealers (Ass't XI; R. 89, 133).

9. Refusing to permit the witness Miller to testify concerning the sale of Green Streak on the Pacific Coast generally (Ass't XVI; R. 90, 172).

10. Refusing to permit the witness Lakin to testify to the written acknowledgments or waivers required from dealers before permitting them to buy Green Streak (Ass't XIV; R. 90, 158-9).

11. Sustaining objection to the offer of such written waivers or acknowledgments in evidence (Dft's Exhibit "A" for identification, R. 197; Ass't XV; R. 90, 159, 47, 197).

12. Refusing to permit the defendant to prove any fact under its affirmative defense (Ass't XVII; R. 90, 177-180).

13. Refusing to permit the defendant to prove complainant was in default under the contract (Ass't XVIII; R. 90, 177-180).

14. In permitting the witness Polsky to testify to threats or statements made to him by dealers and operators concerning suits for Green Streak (Ass't XIX; R. 91, 132).

Most of the Errors specified, particularly 1 to 5 inclusive, naturally fall within the discussion under Headings I and II and may be deemed grouped and treated thereunder.

The other Errors specified, and some of those included under 4 and 5 requiring special treatment, will be discussed under Heading III of this brief.

ARGUMENT

I

THE PRODUCT DOES NOT COME WITHIN THE CONTRACT

(Specifications of Error 4 and 5)

Before Green Streak can be said to come within the contract, it must meet the following tests:

1. It must be of the quality appellant is selling to its "dealer trade" *generally.*

2. It must be of the character *ordinarily* sold by appellant to "service station operators."

The evidence showed that originally the appellant marketed but one grade of gasoline, which was known as "Shell gasoline" and was its main grade of gasoline. This name was changed for advertising purposes to "Shell 61" and later to "Shell 400," as its quality improved (R.165). "Shell 400" was the only brand marketed when the contract in question was entered into (R. 123). During the existence of the contract the name of this brand again was changed and this time to "Shell 3-Energy," under which name it was being marketed at the time of the trial. However, these different brands were at all times substantially the same gasoline, except that it was improved from time to time by the Company's chemists (R. 165). But about a year after the contract was entered into the appellant commenced to market in addition a premium or better and higher grade of gasoline known as "Super-Shell" (R. 165). This gasoline was a special blend and sold for a higher price and under the contract appellant was not entitled to purchase it because it was a "special refined

or blended gasoline sold * * * at an increased price." Appellee knew this (R. 135). But the contract was orally modified and finally appellant consented to sell this gasoline to appellee on a temporary, or day to day basis (R. 135). Later the appellant discontinued the marketing of Super-Shell and supplanted it by "Shell-Ethyl," likewise a specially blended gas sold at a higher price. This gasoline was really 3-Energy combined with a product or substance of the Ethyl Corporation which owned and controlled the process of Ethylizing gasoline. It can only be handled through a license from the process patentee. The appellant had such a license but appellee did not, and was, therefore, not entitled to it, both by reason of the contract and by reason of having no license (R. 175). However, the appellant finally consented to let appellee sell it under appellant's license (R. 175, 166), under oral modification of the contract (R. 166) on a temporary day by day basis.

As the Vice-President of the Shell Oil Company said (R. 175):

> "The Independent Petroleum Company has never been granted a license to sell Ethyl, but they are selling it under our license."

and

> "We have a license and have permitted them gratuituously to buy it from us and sell it. But they are not entitled to it under their contract."

Thus up to the time Green Streak came out appellant had been marketing at all times only two grades of gasoline; the *main* grade, now known as 3-Energy, and the *premium* grade known as Shell-Ethyl (R. 136). Appellee at all times received the main grade, but got

the premium grade only after negotiations and oral modification of the contract.

The purpose in marketing Green Streak is best told in the words of the appellant's officials. Mr. E. L. Miller, Vice-President of the Shell Oil Company, residing in San Francisco, said (R. 171):

> "The reason we were putting out this third brand of gasoline was so that we would be competitive with some of our independent competitors. The sales of our Shell gasoline were going down, while the sales of independent gasoline were going up, and it was self evident we had to put a product on the market that we could market in competition with this inferior independent gasoline, and not destroy the value that we had been trying to build up for years on our Shell brand of gasoline."

Mr. Lakin, the Sales Manager for the Northern Division, embracing the states of Washington, Oregon, Montana, Idaho and the Province of British Columbia, said (R. 158-9):

> "The Company commenced to market Green Streak in the Northwest about July 2nd of this year. The purpose is this: We have Shell-Ethyl, which is distributed by ourselves, and is primarily distributed through service stations, for use in cars that require a gasoline of high anti-knock quality; as a rule, cars with high compression, 3-Energy is a gasoline that has also a high anti-knock quality, quick starting features, good mileage features. It is a balanced fuel, one that will perform in any make of automobile, and in practically any make of combustion motor, and will meet the requirements of the trade. Green Streak is an old fashioned gasoline that has indifferent starting qualities, is not high in anti-knock qualities, does not accelerate quickly and readily, and will just get by. We market Green

> Streak in order to meet competition in certain parts where gasolines are sold at a lower price."

and

> "The purpose in manufacturing Green Streak was to have gasoline available in those areas wherever gasolines were being sold at cheaper prices."

And as the Chief Chemist, brought up from Martinez, Cal., to testify at the trial, said (R. 156):

> "Instead of reducing the price of 3-Energy we reduced the quality of gasoline and get Green Streak."

However, Green Streak was a cheap product and because 3-Energy was a product with a reputation and upon which the Company had spent millions of dollars and years of effort in producing, advertising and promoting, it was deemed most important that the marketing of it should be controlled so that it could not be sold by unscrupulous dealers under the name of the higher grades of gasoline, or substitutions of it be effected, the marketing policy of the Company ruined, the name of 3-Energy prostituted and the public fooled.

Therefore, its sale was restricted. *It was not sold generally to the dealers nor ordinarily to service station operators.* As Mr. Lakin said (R. 158):

> "We do not desire to sell Green Streak; we desire to forward the sale of 3-Energy. In cases where we sell Green Streak, we sell it for cash. We sell it where we feel that competition justifies it, and where we feel we have control of the distribution of Green Streak."

and (R. 161):

> "It is entirely necessary that we handle the distribution of Green Streak carefully, otherwise it

could upset our market generally. Substitution could occur."

Before appellant would sell the gas to any dealer, the dealer was required to acknowledge in writing that (R. 158-9; Deft's Ex. "A"):

1. If he had a contract with appellant it was not to have been deemed to have been delivered in pursuance of the contract; and

2. He would pay cash; and

3. Delivery might cease at any time; and

4. Any existing contract should not be deemed applicable to the Third Structure gas; and

5. That the amount delivered should not be taken into consideration in computing rentals or payments.

And even though the dealer might be glad and willing to comply with such restrictions he would not necessarily get the gasoline (R. 161).

"Even assuming that a dealer wants this product and is willing to take it under any terms that we lay down, we will not sell it to him. There may be many cases where we did not desire to sell it. There might be certain areas where we did not desire it to be distributed. There may be certain dealers we would feel it inadvisable to give Green Streak to regardless of their willingness to meet our requirements. This is because in order to market properly, it is entirely necessary that we handle the distribution of Green Streak carefully, otherwise it could upset our market generally. Substitution could occur."

But the proof of the pudding is in the eating.

At the time of trial appellant sold gasoline generally to one hundred and twenty-two 100% dealers of Shell products and forty-eight split pump accounts (that is dealers who handles the products of other companies as

well as appellant's). *Not one of the split pump accounts was being delivered Green Streak and they could not get it.* Only forty-eight out of the one hundred and twenty-two 100% accounts were buying or could buy Green Streak from appellant. Hence out of one hundred seventy regular dealers in the territory covered by the contract, only forty-eight could purchase and handle the product (R. 160-174). Mr. Lakin said (R. 161-2):

> "We do not sell Green Streak gasoline generally to our dealers. In the Seattle area, which includes Richmond Beach, and which is the area in which the Independent Petroleum operates, about 28% of our dealers purchase Green Streak. We do not sell it to any of the split pump accounts. We do sell it to some of the 100% dealers."

Nor could a dealer with only one pump purchase the product (R. 165).

Appellee placed on the stand several independent dealers who were buying Green Streak from appellant, but every one of them admitted that he had to sign an acknowledgment required by appellant before he could get the product, and pay cash for it (R. 143-152).

Much capital was made by appellee at the time of trial of the fact that appellant was selling Green Streak directly to the consumer on the street and highway. That is true. Through its retail department, Shell Service, Inc., appellant did sell direct to the consumer but this was not a selling of the gasoline to its "dealer trade" or to "service station operators," which was the only selling denominated by the contract as a test of whether the product came within the contract.

The Service Station, Inc., stations were the Company's own stations and not dealer stations.

Appellee called Mr. Dietz to the stand, manager of those stations, who testified (R. 143):

> "I am collection manager of the retail department of the Shell Oil Company or Shell Service, Inc. There is no difference between Shell Service, Inc., and Shell Oil Company. It is all one. I operate 31 service stations in Seattle."

and

> "These stations which I mention are not dealer's stations of the Shell Oil Co. They are simply retail stations of the Shell Oil Company and the handling of gasoline there is simply a bookkeeping proposition."

E. L. Miller, Vice-President of the Shell Oil Co., and President of Shell Service, Inc., said (R. 172):

> "Shell Service, Inc., stations are not dealers' stations. They are stations that are owned by the Shell Oil Company and operated as the Shell Oil Company's retail outlet and for the purpose of convenience we operate them under the name of Shell Service, Inc. The major portion of the buildings are owned, the ground on some of them we own, and some we lease. In some instances we lease a going station and put it under the Shell Service, Inc., chain. The Shell Service, Inc., is a department just the same as a lubricating or a fuel oil department. The supervisors for and managers for Shell Service, Inc., receive their salary each month from the Shell Oil Company on Shell Oil Company's checks. They are all the same concern, owned by the same parties and same interests but handled for convenience under different names."

Green Streak was sold by the appellant through its retail department to the consumer direct because (R. 164):

> "The Green Streak that is located in the Company stations, owned and controlled, is directly under our control, which is the only manner in which we can allow Green Streak to prevail."

Therefore, can it be said that there was a selling by appellant of Green Streak *generally* to its "dealer trade" or that Green Streak was of the character *ordinarily* sold to "service station operators" when in the area covered by the contract not one single pump dealer or operator had it, or could buy it, not one split pump dealer or operator had it or could buy it, and of the one hundred twenty-two 100% dealers or operators only forty-eight had it and could get it, and they were obliged to acknowledge certain limitations and restrictions on the sale before they could purchase it? We think not.

Mr. Webster defines the word "generally" as follows:

> 1. In general; commonly; extensively, though not universally; most frequently.
>
> 2. In a general way, or in a general relation; in the main; upon the whole; comprehensively.
>
> 3. Collectively; as a whole; without omissions.

Certainly Green Streak is not being sold "extensively," "in the main" or "comprehensively."

And he defines the word "ordinarily" as follows:

> According to established rules or settled method; as a rule; commonly; usually; in most cases.

Nor is it sold according to "established rules."

We take it that if the Shell Oil Company had manufactured Green Streak and sold it direct to the consumer

up and down the streets and highways, but did not sell it to the dealer or service station operator at all, that it would be conceded that the product would not come within the contract in this case. If, therefore, the Shell Oil Company sees fit to sell it to the public direct, but in a very special and limited way to certain dealers and service station operators, that it cannot be said to come within the contract unless such sale is general and ordinary. We submit that the sale of the product has not approached any where near the degree that might be termed a general or ordinary selling to dealers and operators.

Counsel for appellant offered to prove a similar and limited and restricted sale up and down the Pacific Coast, but the Court declined to permit it (R. 172).

It is, therefore, the position of the appellant that the product does not come within the contract and that the Court erred in so finding.

The Trial Court seemed to think that the language of the contract defining the gasoline embraced within it was governed by the Ejusdem Generis Rule (R. 47-8). But the Learned Trial Court both misinterpreted and misapplied the rule. By this rule when general words follow an enumeration of persons or things by words of more particular and specific meaning, the more general words are not construed in their widest sense but are restricted to persons or things of the same general kind or class more specifically mentioned.

Black's Law Dict., p. 415;

Bouvier's Law Dict., p. 979.

But the language in the contract in question is not to be tested by any such rule. The first inquiry is whether

Green Streak comes within the description of gasoline being sold to the "dealer trade generally" or "ordinarily to service station operators." If it comes within that general definition then the inquiry is: Is it excepted by the exclusion clause, "All specially refined or blended gasolines sold by it for special purposes at an increased price or prices."

Obviously, not being sold "at an increased price or prices" it is not *specifically* excluded. Therefore, the sole question for determination is: *Does it come within the language of the contract?*

Now what would Mr. Polsky do if he could get this gasoline? The best evidence is what he *did* when he *did get it;* for he was able to purchase it for a short time under mandatory injunction issued preliminarily without notice by the State Superior Court before the cause could be transferred to the Federal District Court.

He marketed it under the name of "Skookum" and immediately proceeded to and did sell it to split pump accounts (R. 138). Thus he commenced the undermining of the whole marketing structure and policy of the Company. Control of the product and protection for the name of 3-Energy immediately becomes lost. Should the appellant be required to furnish this product to appellee, appellee can place it at once in those places where appellant will not, and dealers and operators with whom appellant has no contractual relationship and over whom appellant has no control are given carte blanche power to use the product scrupulously or unscrupulously and to the prejudice of the sale of main grade, 3-Energy.

II

SPECIFIC PERFORMANCE SHOULD NOT HAVE BEEN DECREED

(Specifications of Error 1, 2, 3, 12 and 13)

The fundamental principle involved is well expressed in the general rule that specific performance of contracts in relation to personal property will not be enforced.

This is absolutely true and admits of no exception if:

1. Complainant has an adequate remedy at law; or

2. The contract lacks mutuality; or

3. The complainant's hands are unclean—more aptly expressed, if the complainant is himself in default; or

4. There is doubt as to the complainant's right on the merits or the contract is indefinite or uncertain.

If any one of the above is true, then this decree must be reversed. *We will demonstrate that all are true.*

The same principles applicable to the decreeing of specific performance govern the matter of issuing mandatory injunctions.

Arizona Edison Co. v. Southern Power Co., 17 Fed. 2d 739;

Engemoen v. Rea, 26 Fed. 2d 576.

Concerning the reluctance with which mandatory injunctions will be granted by the Courts, it is said in 32 Corpus Juris at page 23:

> "However, mandatory injunctions will never be granted unless extreme or very serious damage at least will ensue from withholding that relief; and each case must of course depend on its own circumstances. Such injunctions will never be issued in doubtful cases, where they would operate inequitably

> or oppressively, where there has been unreasonable delay by the party seeking the injunction, where the injury complained of is capable of compensation in damages, or where enforcement will require too great an amount of supervision by the court."

And in 14 R. C. L. at page 317 it is said:

> "Although the existence of this power in a court of equity is generally recognized, it is not regarded with any considerable degree of favor. Courts are reluctant to exercise it, and they act with caution and only in cases of necessity."

Mr. Pomeroy in his 4th Edition, Vol. 4, Sec. 1402, says:

> "The doctrine is equally well settled that equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality."

Furthermore, when purely private controversies obtain and the case involves nothing effected by a public interest, a greater reluctance also is expressed.

In *Arizona Edison Co. v. Southern Sierras Power Co.*, 17 Fed. 2d 739, this Court said (p. 741):

> "Although the general rule of equity practice has been relaxed in cases in which public interests were so far involved as to be found of controlling importance, and of such a nature as to demand the enforcement of similar contracts (citing cases), it is believed that in no instance has specific performance been decreed of contracts such as this, where, as here, public interests were in no way imperiled, and no principle of public policy prevented the relegation of the plaintiff to his legal remedies."

The Supreme Court of Washington said in *Cahalan Inv. Co. v. Yakima*, 193 Pac. 210:

"To conduct a private business is not the function of a Court of Equity."

A

THE COMPLAINANT'S REMEDY AT LAW IS ADEQUATE

1

It will be conceded, or at least not questioned, that the appellant is solvent and readily able to respond in any amount by way of damages should the appellee at any time be found entitled thereto.

This case is very similar to the recent case of *LeMoyne Ranch v. Agajania* (Dist. Ct. of Appeals of Cal., hearing denied by Supreme Court), 8 Pac. 2d 1055. There the contract was one to sell and purchase garbage. In that case the trial court made a finding that it would be impossible for the complainant to compute or ascertain his damages to his business from inability to procure the garbage and that he would lose profits ascertainable only with extreme difficulty. The appellate court said (1056):

> "It was the claim of the plaintiff that if it was compelled to purchase a substitute for the garbage that its damages would be high. As the contract between the plaintiff and defendants was a simple contract to buy and sell, a breach by the defendants would authorize the plaintiff to sue for damages and such damages are fixed by the statute. Civ. Code, Secs 3354 and 3355. Therefore the plaintiff had a plain, speedy, and adequate remedy at law."

and (1057):

> "If the personal property has a market value, is bought and sold in the open market, and has no special or unique value, the remedy at law is sufficient, since with the unpaid purchase money and the moneys recovered by action the vendee can buy in

> the open market property of the same character as that contracted for, if the vendor is in fault."

Other California decisions are quoted from therein and among them *McLaughlin v. Piatti*, 27 Cal. 451, which involved a sale of 500 head of cattle and wherein it was pointed out that the remedy was an action for damages.

In *Emerzian v. Asato*, 137 Pac. 1072, which involved a contract to purchase and sell oranges, it was said:

> "There is a presumption that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation. Civ. Code, Sec. 3387. And where the breach of a contract to transfer personal property can be thus compensated, an injunction cannot be granted to prevent the breach."

And, quoting from Pomeroy, as follows:

> "In general a court of equitable jurisdiction will not decree the specific performance of contracts relating to chattels because there is not any specific quality in the individual articles which gives them special value to the contracting party, and their money value recovered as damages will enable him to purchase others in the market of the like kind and quality."

Continuing, the Court said:

> "If the personal property has a market value, is bought and sold in the open market, and has no special or unique value, the remedy at law is sufficient, since with the unpaid purchase money and the moneys recovered by action the vendee can buy in the open market property of the same character as that contracted for, if the vendor is in fault."

and

> "We cannot see that this case is any different from that where a farmer agrees to sell, but afterwards refuses to deliver, a certain number of tons of alfalfa

hay or other product of his farm of which there is an abundance to be purchased in the open market. In such a case we do not think it would for a moment be contended that the vendee could go into an equity court and restrain this farmer from selling his hay to some other person, compel him to irrigate or otherwise care for it, and bale and deliver it to the vendee at some future time."

Richfield Oil v. Hercules Gasoline Co., 297 Pac. 73, it was said (76):

"Concluding, as we must, that the contract in suit did not convey any interest in the real property, but that it was merely a contract to sell personal property, it necessarily follows that plaintiff is not entitled to equitable relief, because (1) it has an adequate remedy at law; and (2) the contract is not subject to specific enforcement."

In *Clark v. Rosario*, 176 Fed. 180, it was said (185):

"The first and insuperable obstacle to the affirmance of the decree appealed from is that the aggrieved party brought its suit in a court of equity to enforce the specific performance of a written contract, which contract showed upon its face, as the court below expressly held, that for its breach by the appellant and his associates the appellee should not be entitled to a specific performance of it, but should be limited to a stipulated sum as damages of $100,000. Under such circumstances, the only appropriate tribunal for the recovery of that money demand was a court of law. It did not come within the jurisdiction of a court of equity."

Mr. Justice Holmes, speaking for the United States Supreme Court, said in *Javierre v. Central Altagracia*, 54 Law Ed. 859, 217 U. S. 502, which case involved a contract to deliver sugar cane (861):

"The doubt as to the relief granted below is more serious, and, in the opinion of the majority of the

court, must prevail. According to that opinion, a suit for damages would have given adequate relief, and therefore the appellee should have been confined to its remedy at law."

In *Rutland Marble v. Ripley*, 19 Law Ed. 955; 10 Wall 339-363, it was said (963):

"If he has any claim to damages for a breach of the contract, it must be asserted at law, and there his remedy is complete."

In *Seattle v. Puget Sound*, 284 Fed. 659, this Court said (663):

"Again, it would seem that the remedy given by the state statute in the form of an action against the city to compel the setting aside of the fund and the payment of the principal and interest when due is a full, complete, and adequate one under the circumstances."

Warren v. Block (W. Va.), 102 S. E. 672, was a suit to enforce specific performance by injunction of a contract to furnish coal. It was said (673):

"Ordinarily courts of equity will not enforce contracts for the purchase or the sale of personal property to be used for purely commercial purposes, the remedy at law for damages for a breach of such contracts being regarded generally as complete and adequate. There is hardly any article of commerce that is more easily obtained in the open market than coal. It is true plaintiff alleges that it made diligent effort to buy other coal of similar quality to that contracted for, and had not been able to do so; but this is denied in the answer, and the abundance of the product itself discounts the averment. That plaintiff may not have been able to buy coal from the producers to whom it applied does not show that it cannot do so in a reasonable time by applying to others. The coal contracted for is not shown to be of peculiar quality and different from coal produced

> from other mines in the same vicinity. Coal is abundant, and if plaintiff is willing to pay the price it can get it."

and

> "All the coal capable of being produced by the numerous coal mines in the vast coal region in the northern part of this state certainly was not sold, so that the amount of 50,000 tons could not have been obtained by plaintiff to take the place of that it had contracted for, between May 1st when the contract was made, and October 31st when this suit was brought. A case where a plaintiff's damages for a breach of contract can be ascertained more certainly and definitely than in the case here presented can scarcely be imagined."

Another coal case is *Consolidated Fuel Co. v. St. Louis S. W. Ry. Co.* (8th C.), 250 Fed. 395. It was there said (399):

> "We have been unable to find any authority that would allow a common carrier to go into a court of equity to obtain specific performance of such a contract as is involved in this action. To take jurisdiction in equity of the case made by the complaint would be to destroy all distinction between actions at law and in equity. If we shall take jurisdiction in this case, and specifically enforce a contract for the sale and delivery of coal, where could we stop. The next contract presented for us would be for the sale and delivery of engines, for the sale and delivery of railroad ties, for the sale and delivery of cars, or for the sale and delivery of a thousand other articles, which go to make up the equipment of a railroad. The contract price of coal is fixed; the market price of coal and cost of transportation is easily shown; why should equity assess the damages?"

The Supreme Court of Washington denied the right to enforce a contract to furnish heat in *Cahalan Inv. Co. v.*

Yakima, 193 Pac. 210, because of adequacy of the legal remedy, saying (212):

> "A court of equity will not ordinarily specifically enforce the performance of a private contract where the aggrieved party has an adequate remedy at law. Here we think there is such an adequate remedy. The respondent can maintain an action at law in damages for a breach of the contract. The argument advanced against this is the difficulty of making proofs of the actual loss. But the facts present nothing unusual in this respect. The contract was breached when the appellant refused to perform. There can be but one breach, and the respondent now has the right to recover in a single action all the damages it has suffered or will suffer by reason of the breach."

See also:

Duvall v. White, 189 Pac. 324;

Tenn. Elec. Power Co. v. White Co., 52 Fed. 2d 1065.

The following is taken from 58 Corpus Juris at 1034:

> "While statutes in some jurisdictions authorize specific performance of contracts for the sale of personal property in accordance with the general rules, specific performance of a contract for the sale of personal property will not ordinarily be granted because there is an adequate remedy at law, as in action for damages for breach of contract. So a contract to convey chattels having a market value cannot be specifically enforced unless damages in lieu thereof would be inadequate, and a court of equity therefore will not, unless there is some special reason, specifically enforce a contract for the sale of ordinary articles of commerce, which can at all times be brought in the market such as:

BARROOM FIXTURES: (*Meehan v. Owens*, 196 Pa. 69, 46 A 263).

CATTLE: (*Kane v. Luckman*, 131 Fed. 609; *McLaughlin v. Piatti*, 27 Cal. 451).

COAL: (*Consolidated Fuel Co. v. St. Louis Southwestern R. Co.*, 250 Fed. 395, 162 C. C. A. 465; *George E. Warren Co. v. A. L. Black Coal Co.*, 85 W. Va. 684, 102 S. E. 672, 15 A. L. R. 1083; *Fothergill v. Rowland*, L. R. 17, Eq. 132).

CORN: (*G. C. Outten Grain Co. v. Grace*, 239 Ill. A 284).

COTTON: (*Block v. Shaw*, 78 Ark. 511, 95 S. W. 806).

LUMBER: (*Dorman v. McDonald*, 47 Fla. 252, 36 S. 52; *Neal v. Parker*, 98 Md. 254, 57 A 213; *Diamond Lumber Co. v. Anderson*, 216 Mich. 71, 184 N. W. 597; *Flint v. Corby*, 4 Grant Ch. (Ont.) 45.

PIANOS: (*Steinway v. Massey*, 198 Kentucky 265, 248 S. W. 884.

SAUERKRAUT: (*A. G. Lehman Co. v. Island City Pickle Co.*, 208 Fed. 1014, 1017).

WHISKEY: (*Langord v. Taylor*, 99 Va. 577, 39 S. E. 223).

USED CARS:(*Gallagher v. Studebaker Corp.*, 236 Mich. 195, 210 N. W. 233).

OR AN EXISTING BUSINESS: (*Flechs v. Richie*, 91 Okla. 95, 216 P 644.

AND STOCK IN TRADE: (*Carolee v. Handelis*, 103 Ga. 299, 29 S. E. 935; *Flechs v. Richie*, 91 Okla. 95, 216 P 644)."

See extensive annotation in L. R. A. 1918 E, pp. 597-634.

2

Upon breach by the seller of the contract to sell it becomes the duty of the buyer to endeavor to procure the commodity elsewhere and the amount of his damages is the difference between the contract price and the price he is obliged to pay in the market. The Washington Uniform

Sales Act (Sec. 5836-67 of Rem. Comp. Stat. of Washington, 1927 Supp.), provides as follows:

> "Action for Failing to Deliver Goods.
>
> 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.
>
> 2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.
>
> 3. *Where there is an available market for the goods in question, the measure of damages,* in the absence of special circumstances showing proximate damages of a greater amount, *is the difference between the contract price and the market or current price of the goods, at the time or times when they ought to have been delivered,* or, if no time was fixed, then at the time of the refusal to deliver."

Loewi v. Long, 76 Wash. 480; 136 Pac. 673;

Lilly v. Lilly Bogardus Co., 39 Wash. 337; 81 Pac. 852;

Pearce v. Puyallup Co., 117 Wash. 612; 201 Pac. 905;

Sussman v. Gustav, 116 Wash. 275; 199 Pac. 232;

Menz Lbr. Co. v. McNeeley Co., 58 Wash. 223; 108 Pac. 621;

Coast Fir Co. v. Puget Sound Co., 117 Wash. 515; 201 Pac. 747.

The complainant ignored the true, legal and accurate method by which to measure its damages.

No evidence was offered as to the market price of a third structure gasoline. There can be no presumption that another third structure gasoline would have cost complainant more than Green Streak. *And if complainant*

could purchase third structure gasoline at a better price THEN IT SUFFERED NO DAMAGE WHATEVER.

Not the slightest bit of evidence was offered by the complainant that it sought to procure third structure gasoline elsewhere. The complainant entirely disregarded its legal duty in the matter. The only suggestion of the point found in the record is a question by the Court and the answer (R. 127):

> "THE COURT: Were you able to supply yourself, or anybody, with cheap gasoline of the same standard and form?
>
> "A. No, sir, I am not."

But why he was not able to buy some other gasoline is not explained. Gasoline is ever-present, everywhere, universal. Many companies are anxious to sell it—wholesale, retail, any way; yet the complainant makes no effort to procure the gasoline and follow his legal remedy. Perhaps he could not have obtained "Green Streak" elsewhere, but the evidence in this case discloses that many other companies are selling a third structure gasoline (R. 162, 174). There is plenty of it on the market.

There is no evidence and certainly no presumption that any other third structure gas is not substantially the same as Green Streak.

As was said in *Emerzian v. Asato*, supra:

> "We cannot see that this case is any different from that where a farmer agrees to sell, but afterwards refuses to deliver, a certain number of tons of alfalfa hay or other product of his farm of which there is an abundance to be purchased in the open market."

And in *Warren v. Black*, supra, it was said:

> "There is hardly any article of commerce that is more easily obtained in the open market than coal."

And in *Consolidated Fuel Co. v. St. Louis S. W. Ry. Co.*, supra, it was said:

> "If we shall take jurisdiction in this case, and specifically enforce a contract for the sale and delivery of coal, where could we stop? The next contract presented for us would be for the sale and delivery of engines, for the sale and delivery of railroad ties, for the sale and delivery of cars, or for the sale and delivery of a thousand other articles, which go to make up the equipment of a railroad. The contract price of coal is fixed; the market price of coal and cost of transportation is easily shown; why should equity assess the damages?"

Having a legal remedy and not having endeavored to pursue it it is difficult to understand why complainant should be permitted to resort to equitable relief.

3

Instead of pursuing its legal remedy, complainant met the situation by selling the 3-Energy or main grade of gasoline at the price of third structure. This was not a *legal* measure, but nevertheless it was *accurate* in determining *the damages sought to be proved thereby.*

Mr. Polsky said (R. 127-8):

> "I am selling today my first quality gasoline at the cheapest price, at a very great loss to me."

and

> "A. No, sir, *I am losing today about two cents a gallon.*
>
> "THE COURT: So it is a difference between a half cent profit and two and a half cents?

"A. That's right.

"Q. *You are losing that on this gasoline that you are selling at the reduced price in order to meet the competition?*

"A. Yes, sir."

Why, therefore, should complainant be entitled to equitable relief when there is measured accurately, day by day, the damages sought to be proved, *and the appellant is solvent and able to respond?* He said positively his loss was two cents per gallon.

There is no insurmountable difficulty in multiplying the number of gallons of "Aviation" sold at the price of Green Streak at two cents a gallon in an endeavor to arrive at the damage claimed! APPELLEE ITSELF ESTABLISHED THE ADEQUACY OF ITS LEGAL REMEDY BY PROVING ITS DAMAGES.

4

Appellee claims that the two cents per gallon does not fully compensate it for its damages and that it suffers other damages in addition. Such additional damage it claims is in loss of prestige for the name of the main grade of gas it has been selling and loss of patronage.

But there are several answers to this proposition.

The first is that had appellee sought its legal remedy and purchased a third structure gasoline elsewhere it would not be disturbing the name of its main grade or interfering with its sale.

The second is, that it did not prove any loss of patronage. Quite on the contrary. Although it had been able to procure but little Green Streak between July 2nd and Septem-

ber 6th, when this case was tried, its business had not fallen off a bit. He said: "The actual volume of my business has not fallen off" (R. 135).

He claimed inability to comply with dealer contracts, but *not a single contract was introduced in substantiation of any liability on appellee's part to furnish a third structure gasoline to anybody. Not a single dealer or service station operator of appellee's was put on the stand* to testify that he wanted Green Streak, needed it, had demanded it or could not get it from appellee. Indeed, the futility of appellee's position in this regard is seen when it is observed in the record that an attempt was made by appellee to offer contracts between *Shell Oil Company and Shell's dealers*. And then the offer to introduce the contracts was voluntarily withdrawn (R. 133-4).

The next answer is that *there is no other damage than the two cents per gallon*, if any. If appellee is entitled to this gas and cannot get it, then it has placed itself in a most advantageous position. *It is selling its better grade of gasoline at a cheaper price and charging the loss up to appellant.* Appellee stands in a way to increase its business many-fold. For if appellee has built up a patronage of "Aviation," appellee's trade name for 3-Energy, and is now selling *it* at the price of a cheaper gas—appellee should be in a position to attract the automobile traffic of the world to its doors. For who would not buy Packard automobiles at the price of Fords; jems at the price of pebbles; genuine silk at the price of cotton?

But the last, though not the least answer to the suggestion that ruination faces its business is that so far as appellee is concerned it will soon be at an end through

expiration of the contract. So that under the most liberal theory its damages could only be the net profit it could make in the ordinary operation of its business during the balance of the period the contract has to run. The contract will expire February 28, 1933 (R. 137).

But under the terms of the contract appellee's purchase of gasoline between December 15th and December 15th from year to year shall not exceed 4,000,000 gallons. On September 6th when the case was tried appellee had purchased 3,200,000 and had but 800,000 gallons left, to which it was entitled. The undisputed testimony shows that appellee was purchasing at the rate of about 400,000 gallons per month so that on November 1st, or thereabouts *it could no longer obtain any gasoline from appellant* and would not be able to until December 15, 1932, and then only from December 15th until February 28, 1933.

The decree provided for this (R. 78).

Mr. Fisher, the Northern Division Manager, testified that he had warned Mr. Polsky on several occasions that he was running up to his maximum and that his available supply would end some substantial period prior to December 15th (R. 168).

Appellee's damages, if any, during this small remaining period can be accurately measured. Damages, if any, from the inability to obtain Green Streak is of minor consequence when the short period of dealing between the parties is considered.

B

THE CONTRACT LACKS MUTUALITY

In *Pantages v. Gruman*, 9th Cir., 191 Fed. 317, it was said (323):

> "It is a fundamental principle that specific performance of a contract will not be decreed unless it can be rendered obligatory upon both parties. In other words, the remedy must be mutual; otherwise, it cannot be invoked. (Citing cases). Nor, it is held, will the remedy avail unless both parties at the time the contract is executed have the right to resort to equity for its specific enforcement. *Norris v. Fox, et al.* (C. C.) 45 Fed. 406. The principle has been carried into the statutes of California, and is enforced by its courts. *Pacific Electric Ry. Co. v. Campbell-Johnson*, 153 Cal. 106, 94 Pac. 623."

In *Javierre v. Central Altagracia*, 54 Law Ed. 859; 217 U. S. 502, it was said (861):

> "There is, too, a want of mutuality in the remedy, whatever that objection may amount to, as it is hard to see how an injunction could have been granted against the appellee had the case been reversed."

Rutland Marble v. Ripley, 19 Law Ed. 955, 10 Wall 339-363, was a case involving the sale of marble from a quarry. The United States Supreme Court said (961-962):

> "Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when—from personal incapacity, the nature of the contract, or any other cause—a contract is incapable of being enforced against one party, that party is equally incapable

> of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."

Specific performance of a contract to deliver coal was sought in *Black Diamond Co. v. Jones Coal Co.* (Ala.), 76 So. 42, and it was said (43-44):

> "It has been frequently held by this court that mutuality in the equitable remedy was of the essence of the right to specific performance of the contract.'

and

> "The contract here in question provides for the delivery of coal to the complainant and contemplates it shipment by the complainant and a monthly credit extended. Had coal declined in price, rather than advanced, it is quite clear that respondent could not have maintained a bill requiring the complainant to accept the coal, and pay for the same at the price agreed upon, but his remedy would have been an action at law."

In *Pullman Palace Car Co. v. Tex. Ry. Co.*, 11 Fed. 625, it was said (630):

> "No such decree or order should be rendered when there is not a mutuality of remedy between the parties, obtainable from the court."

The following statement was made in *Engemoen v. Rea*, 26 Fed. 2d, 576 (578):

> "The general rule is that a court of equity will not enjoin a breach of contract which is executory on both sides where the remedy is not mutual. Where, therefore, the obligation imposed by the contract upon the plaintiff is of such a nature that a court could not specifically enforce it against him at the instance of the defendant, a court of equity will ordinarily deny injunctive relief to the plaintiff against a violation of the contract by the defendant,

on the ground of want of mutuality of remedy." (See cases therein cited).

Many cases are cited and reviewed in the case of *General Electric Co. v. Westinghouse Electric Co.*, 144 Fed. 458, wherein it was said (462):

> "Should the General Electric Company violate the agreement in the respect mentioned on its part the Westinghouse Company would be compelled to resort to an action at law for damages. If each company is relegated to its remedy at law for a violation of the agreement they stand on an equality, but if not the one has an advantage over the other. If the plaintiff company may restrain defendant company from making and selling these controllers in violation of its agreement, the defendant company ought to have a corresponding right to compel the plaintiff company to make and furnish to it controllers pursuant to the agreement. In short, there is no mutuality of remedy, and, in such cases, specific performance is not decreed."

Certainly this contract lacks mutuality. Suppose appellant considered that Green Streak came within the contract and appellee did not and appellant attempted to force appellee to purchase the cheaper grade as well as the main grade of 3-Energy. Appellee's first answer in a court of equity would be, "There is no provision as to the amount of such gasoline I should take, and I will therefore take one gallon per month and the balance in 3-Energy" or "I will take one gallon of 3-Energy per month and the balance in Green Streak." A court of equity would not amend or rewrite the contract to fix the respective amounts of both products that appellee should take. The appellant therefore, would be without equitable remedy.

But the decisive answer is that if appellee declined to buy it, no court could operate its business in such a way as to compel it to take certain cash and pay it out for Green Streak. Appellee must be insolvent if its claims are true. It is claimed that it cannot operate two weeks without Green Streak (R. 132). How then could appellant have turned the tables on appellee if the situation had been reversed?

But the remedy of a seller is always in law and is definitely fixed by statute and is accurate.

Sec. 5863 of Remington's Compiled Statutes, 1927 Supp. (63):

> "(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods, according to the terms of the contract or the sale, *the seller may maintain an action against him for the price of the goods.*
>
> "(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, *the seller may maintain an action for the price*, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.
>
> "(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 5836-64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer.

Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

Sec. 5836 of Remington's Compiled Statutes, 1927 Supp. (64):

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, *the measure of damages is*, in the absence of special circumstances showing proximate damage of a greater amount, *the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.*

"(4) If while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

A court of equity not being open to appellant had appellee declined to perform, it is not open to appellee in the event of appellant's nonperformance.

C

A SUBSTANTIAL DOUBT AND UNCERTAINTY EXISTS AS TO WHETHER THE PRODUCT IN QUESTION COMES WITHIN THE CONTRACT

If there is any doubt as to the complainant's right to the product in question, or any indefiniteness, or uncertainty with reference to the terms of the contract whether the product comes within it, specific performance will not be decreed.

In *Minnesota Tribune Co. v. Associated Press*, 8 Cir., 83 Fed. 350, Mr. Justice Thayer said (356-357):

> "But, waiving that question, it must be borne in mind that it is a well-established rule that courts of equity will not undertake to enforce an agreement if any of its provisions are so far indefinite or ambiguous as to render it uncertain what were the intentions of the parties, and what obligations they intended to assume. A suit for specific performance can only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. If the contract which a complainant seeks to enforce is vague or uncertain, a court of equity will not interfere, but will leave him to his legal remedy."

The Court said in *Moyer v. Butte Miners' Union*, 246 Fed. 657 (662):

> "It requires no extended citation of authority to sustain the rule that one who seeks to enforce the specific performance of a contract must establish very clearly and to the entire satisfaction of the court the existence of the contract and the terms thereof."

And in *Pioneer Reduction Co. v. Beedle*, 260 Fed. 801 said (807):

"We think it unnecessary to cite the many authorities that might readily be cited to show that the court below did not err in holding that in such a case it is essential that the evidence be clear and satisfactory, both as to the existence of the contract sought to be enforced, as well as to its terms, and in accordingly denying the decree for specific performance thereof."

Touching specific performance, Mr. Justice Harlan said in *Hennessy v. Woolworth*, 128 U. S. 438 (442):

"It should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or, where it is left in doubt whether the party against whom relief is asked in fact made such an agreement."

In *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 37 Law Ed. 749, it was said (755):

" 'The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy.' 15 U. S. 2 Wheat, 336, 341 (4: 253, 255). So this court has said that chancery will not decree specific performance, 'if it be doubtful whether an agreement has been concluded, or is a mere negotiation,' nor 'unless the proof is clear and satisfactory, both as to the existence of the agreement, and as to its terms.' "

The Supreme Court of Washington said in *Cahalan Inv. Co.*, 193 Pac. 210 (212):

"It is a general rule that a decree for the specific performance of a contract will not be granted unless the evidence of the making of the contract is clear and convincing (citing cases), and we are not persuaded that the evidence here satisfies the rule. But we think we should refrain from a discussion of the

> evidence or from expressing the deductions and conclusions we draw therefrom. The conclusion we have reached in the case as a whole leaves open to the respondent the right to maintain an action at law as for a breach of the contract, and any discussion of the evidence on our part could well prejudice one or the other of the parties in the trial of such an action. *It may be well to say, however, that a distinction exists in the degree of proof required to establish a contract when the action is one to recover in damages for a breach of the contract and when it is one to enforce a specific performance of the contract. In the one case the plaintiff may recover if he shows the existence of the contract by a preponderance of the evidence (provided, of course, his evidence makes a prima facie case), while in the other he must satisfy the court of the existence of the contract by clear and convincing evidence.*" (Italics ours).

See also *Ellis v. Treat*, 236 Fed. 120.

The foregoing cases establish the rule that the complainant's case must be proved with greater certainty if specific performance is sought, rather than a legal remedy. It is a wise rule. And if doubt exists under such measurement of the proof, then the remedy should not be granted.

It seems to us that when it is established beyond question that not a single-pump dealer, not a split pump dealer, and but few 100% dealers (and then only under special circumstances) can purchase this commodity that it is not within the express terms of the contract. But if it be found that it is, so much doubt must attend the finding that it should be resolved as a case not entitled to equitable relief, but rather to disposition in the usual manner by way of damages.

D

COMPLAINANT IS ITSELF IN DEFAULT

If the complainant is himself in default, then he does not come into equity with clean hands and cannot urge performance on the part of the other party.

In *Rutland Marble v. Ripley*, 19 Law Ed. 955, 10 Wall 339-363, the U. S. Supreme Court said (961):

> "There are other objections, however, to a decree for a specific performance in this case which are more serious. Such a decree is not a matter of right. It rests in the sound discretion of the court and, generally, it will not be made in favor of a party who has himself been in default."

In *Cronin v. Moore*, 210 Fed. 239, this Court said (242):

> "Specific performance is not a matter or right. It rests in the sound judicial discretion of the court. Before it may be awarded, it is the substantial conditions of the contract. He must himself do equity, and must come into court with clean hands."

And repeated the language in *Ellis v. Treat*, 236 Fed. 120.

In *Elkhorn Coal Co. v. Kentucky River Coal Co.*, 20 Fed. 2d 67, it was said (71):

> "No one has a right in equity to enforce specifically a contract which he has in anticipation wrongfully and intentionally violated."

This rule is so well known and so firmly established that further elaboration of it is unnecessary.

Specification 13 (Assignment XVIII, R. 90, 177-180.

Default on the part of appellee was pleaded affirmatively in the answer (R. 40). And it was sought to be proved

at the time of trial that appellee had obtained possession of gasoline up to the sum of $47,390.91, without paying for it and over the objection of appellant, and the Division Credit Manager of the appellant was placed on the stand for that purpose. Objection was made and sustained, whereupon offer of proof was made and the trial court said: "That is something a court of equity is not concerned about." (R. 177-180).

If the complainant was in default and not doing equity then it was not in Court with clean hands and was not entitled to equitable relief. Certainly appellant should have been granted the right to show this.

In addition, the record shows affirmatively that appellee when it could get the gasoline would have used it as a sword to undermine and ruin the whole sales policy and marketing structure of appellant. It proceeded at once to sell Green Streak to those accounts to whom appellant would not sell it and who could not get it (R. 138). Of what value would appellant's contract be to it if by means of it appellee could immediately place the gasoline where appellant would not? The whole purpose in marketing and selling Green Streak would be lost if appellee had the ability and opportunity to pour it out in all those places from which appellant saw fit to withhold it in an endeavor to protect the name of 3-Energy and guarantee its sale, rather than that of the cheaper grade!

Such conduct on the part of appellee does not warrant equitable relief in its behalf.

III
OTHER ERRORS SPECIFIED

A
Refusal to Consider Written Acknowledgments

Specifications 10 and 11. (Assignments XIV and XV; R. 47, 90, 158-9, Defendant's Exhibit "A," R. 197).

In proving that the commodity was not sold "generally" and "ordinarily" it was important to establish the limitations and restrictions upon its sale. For this purpose it was sought to establish that no dealer could procure it without signing an agreement acknowledging certain things. The Assistant Division Manager was asked to testify to these limitations and to identify and prove copies of the written acknowledgments. The Court declined to hear the testimony and refused to admit the instruments, reserving ruling until conclusion of the cause when in his oral opinion he held them immaterial (R. 47).

We can see no reason why his testimony and these instruments were not material and *important* on appellant's theory of the cause. In so ruling the Court committed error and in rejecting them indicated a failure to properly understand the meaning of the contract and the theory of the defense.

B
Handling of Green Streak on the Pacific Coast Generally

Specification 9. (Assignment XVI; R. 90-172).

One of the questions for the Trial Court's determination was whether the commodity was sold generally to the dealer trade *in Seattle*. In determining the truth with

respect to *Seattle* it became an important circumstance as to whether it was sold generally on the Pacific Coast; whether it was or was not sold generally on the Pacific Coast was not a decisive factor and the proof with respect to it was not offered as determinative of the issue but as *corroboration* of the truth of the situation in Seattle.

For this purpose Mr. E. L. Miller, Vice-President of appellant, located in San Francisco, and fully conversant with the matter was interrogated, but the Trial Court declined to hear any of the testimony. This was error.

C

TESTIMONY WITH RESPECT TO DAMAGE

Specification 6. (Assignments VI to XIX inclusive; R. 86, 127, 131).

This specification is covered by the discussion under heading II-A.

Damage was sought to be proved by the wrong rule.

D

HEARSAY TESTIMONY WITH REFERENCE TO DEMANDS AND THREATS AND CONCERNING WRITTEN CONTRACTS

Specifications VII and VIII and XIV. (Assignments 10 and 11 and 19; R. 89, 131-3).

The witness Polsky was permitted to testify that "threats" and "demands" had been made upon him touching his inability to deliver Green Streak to his own dealers to whom he was under contract, and as to how his dealers "felt" about the matter.

This was hearsay testimony of the boldest kind. This testimony became a part of the record and subject to

being accepted as true. No opportunity was given to appellant's counsel to cross examine such parties.

Appellee had no right to contract for the delivery of Green Streak until he had established his ability to procure it.

If it had made any such contracts by which it was bound, then those contracts themselves were the best evidence.

The whole fabric of appellee's proof was most vague, uncertain and indefinite and yet vicious and dangerous because it created an impression of fact and truth by suggestion, inference and hearsay testimony without even making a prima facie case by competent evidence.

If there was any truth in the claim that appellee had contracts outstanding by parties who had made threats or demands, then the proof of it by the best evidence would have been a simple matter.

IV
CONCLUSION

It is respectfully submitted that when all the evidence is fairly considered Green Streak does not come within the contract, but that if it does then the extraordinary remedy of specific performance has been exerted in a case little deserving of it because it involves a simple contract to buy and sell a common commodity. No attempt has been made to procure it on the open market. If it could be purchased cheaper in the open wholesale market, then no damages whatever have been sustained by the complainant. The damages sought by the evidence to be

proved have been measured accurately and the appellant is able to respond. It is one of many similar cases where the legal remedy has been held adequate.

Appellant prays that the decree be reversed and the cause dismissed.

Respectfully submitted,

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Attorneys for Appellant.
IVAN L. HYLAND,
FORD Q. ELVIDGE,
MARY H. ALVORD,
of Counsel.

No. 6960

United States
Circuit Court of Appeals
For the Ninth Circuit

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS, a Corporation, Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES OF ATTORNEYS.

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District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 12th day of August, in the year of our Lord one thousand nine hundred and thirty-two.

Present: the Honorable FRANK H. KERRIGAN, Judge.

No. 19,335-K

In the Matter of
HENRY DUFFY PLAYERS, a corp.,
in Bankruptcy.

It is ordered that the order of the referee as to the allowance of fees to the attorney for the trus-

tee, brought to this Court for review, be and the same is hereby approved and affirmed, and that the account of the trustee be and is hereby approved, except as to the item of $500.00 allowed to the attorney for the receiver, which said sum is disallowed and stricken from the account, all of which more fully appears in signed order this day filed.

[1*]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19,335

In Bankruptcy.

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS, a Corporation, Bankrupt,

Appellee.

In the Matter of

HENRY DUFFY PLAYERS,

a corporation, Bankrupt.

AGREED STATEMENT OF THE CASE.

(Under Equity Rule 77.)

The question presented by the appeal of Louis E. Goodman arose and was decided in the District Court as follows:

On June 6, 1930, Henry Duffy Players, a corporation, was adjudicated an involuntary bankrupt upon a petition filed in this Court on May 17, 1930, and the administration of the estate of said bankrupt was referred generally to Honorable Thomas J. Sheridan, one of the standing referees in bankruptcy of this Court, and a receiver was appointed and qualified on May 17, 1930, and operated the business of the bankrupt until the appointment and qualification of the trustee on July 1, 1930. With the permission and approval of this Court, Louis E. Goodman was regularly appointed and rendered services as attorney for said receiver, in accordance with General Order XLIV, and Reuben G. Hunt was regularly appointed and rendered services as attorney for said trustee. In December, 1931, three matters came on for hearing and decision by said referee: (1) the trustee's second and final account; (2) an application by [2] said Reuben G. Hunt for an allowance of $5,140.50 to him as compensation for his services as attorney for said trustee; (3) an application by said Louis E. Goodman for an allowance of $500.00 to him as compensation for his services as attorney for said receiver, which application and the hearing thereon fully complied in all respects with General Order XLII. All three matters, as aforesaid, were regularly heard, and on April 16, 1932, said referee decided them and entered orders as follows: (1) said account was settled; (2) the said application of said Reuben G. Hunt was allowed in part and disallowed in part;

(3) the said application of said Louis E. Goodman was allowed in full.

No petition for review under General Order XXVII, nor any petition for review at all, was ever filed, with respect to either the order settling the account, as aforesaid, or the order allowing the application of said Louis E. Goodman. Neither of those matters was contested before either said referee or this Court. Rule 9 of the Bankruptcy Rules of this Court is as follows:

> "A petition for a review by the Judge of an order made by the Referee, as provided in General Order No. XXVII of the General Orders in Bankruptcy, must be filed with the Referee within ten days after the date of notice of such order. For good cause shown the Referee may at any time, within said period of ten days, grant a reasonable extension of time within which a petition for review may be filed, and grant further reasonable extensions within the period of the previous extension."

No extension of time thereunder has ever been requested or granted, in connection with the orders mentioned in this Statement of the Case.

Said Reuben G. Hunt alone filed, under General Order XXVII, with said referee a petition for review of the order disallowing his application in part, and therein set out, as error complained of, solely and only the disallowance in part of the

ap- [3] plication of him, said Reuben G. Hunt, and praying solely and only for a further allowance to him, and said referee thereupon made his certificate under General Order XXVII. After hearing said review, this Court made the following order on August 12, 1932:

> "It is ordered that the account as allowed by the referee be and the same is approved with the exception of the item of $500 allowed to the attorney for the receiver which is stricken from the account."

GEO. M. NAUS,
GOODMAN, BACHRACH & BROWNSTONE,
Attorneys for Appellant.

REUBEN G. HUNT,
Attorney for Appellee.

The foregoing is approved as an agreed statement of the case under Equity Rule 77.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Oct. 5, 1932, 3:34 P. M. Walter B. Maling, Clerk. [4]

[Title of Court and Cause.]

MEMORANDUM AND ORDER.

I find, after reviewing the services rendered by the attorney for the trustee of the above entitled

estate and the condition of the estate, that the allowance of fees to the attorney for the trustee by the referee was just and proper.

I notice that $500 was allowed to the attorney for the receiver for services rendered since the election and qualification of the trustee. Since the account was not contested, undoubtedly the propriety of this allowance was not called to the referee's attention. A receiver in bankruptcy is not a general receiver but a special receiver appointed by authority of statute. Section 2 of the Bankruptcy Act (11 U. S. C. A., Sec. 11). This section provides for the appointment of a receiver until the proceeding is dismissed or the trustee is qualified. The appointment is limited by the terms of the statute. Booneville National Bank v. Blakely, 107 Fed. 891; In the Matter of Empire Finance Corp., No. 20,707, in Northern District of California. Therefore upon the qualification of the trustee herein the receiver was automatically divested of authority and power to represent the estate. As such he had no authority to employ counsel and the counsel's fee is not a proper charge against the estate. It is regretted that he can not be compensated for services performed the estate under a misappre- [5] hension as to the authority of his client, but the Court is without jurisdiction to allow such a fee.

IT IS ORDERED that the account as allowed by the referee be and the same is approved with

the exception of the item of $500 allowed to the attorney for the receiver which is stricken from the account.

Dated this 12th day of August, 1932.

KERRIGAN,
District Judge.

[Endorsed]: Filed Aug. 12, 1932, 12:14 P. M. Walter B. Maling, Clerk. [6]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 8 pages, numbered from 1 to 8, inclusive, contain a full, true, and correct transcript of certain records and proceedings requested by appellant, in the matter of Henry Duffy Players, a corp., In Bankruptcy, No. 19,335-K, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record is the sum of two dollars and seventy-five cents ($2.75) and that the said amount has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of October, A. D. 1932.

[Seal] WALTER B. MALING, Clerk,
By C. M. Taylor, Deputy Clerk. [9]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes petitioner Louis E. Goodman who has filed herewith a petition for the allowance to him of an appeal from the order of the District Court of the United States in and for the Southern Division of the Northern District of California, made on August 12, 1932, in the matter of Henry Duffy Players, a corporation bankrupt, No. 19,335-K, annulling an allowance of $500.00 theretofore made to him by the Referee in Bankruptcy of the said District Court in charge of the administration of the estate of the bankrupt for services as counsel for G. A. Blanchard, the receiver in bankruptcy of said estate; and files the following assignment of errors upon which he will rely for the prosecution of the said appeal:

1. Said District Court lacked jurisdiction to make said order in so far as the said petitioner Louis E. Goodman was concerned for the reason that the matter of such allowance was not before the said District for consideration upon a petition

for review filed pursuant to General Order No. 27 of the Supreme Court of the United States relating to bankruptcy or otherwise and said allowance had long prior thereto become a final order of the bankruptcy court by reason of the fact that no such petition for review had ever been filed.

2. The said order is erroneous in that it is predicated upon the proposition that a receiver in bankruptcy is not entitled to have the services of counsel after the appointment and qualification of the trustee in bankruptcy because receivers in bankruptcy must necessarily have the services of counsel in contested matters respecting the settlement of their accounts as was the case here and such accounts may be heard and settled after the appointment and qualification of the trustee in bankruptcy.

WHEREFORE said appellant prays that the said order of August 12, 1932, in so far as it affects him may be reversed.

Dated, August 31, 1932.

GOODMAN, BACHRACH &
BROWNSTONE,
GEO. M. NAUS,
Attorneys for Appellant.

Copy received Sept. 6, 1932.

REUBEN G. HUNT,
Attorney for Appellee.

[Endorsed]: Filed Sept. 7, 1932. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the seventh day of September, in the year of our Lord one thousand nine hundred and thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

ORDERED petition of Louis E. Goodman for allowance of appeal under section 24b of the Bankruptcy Act, this day filed, submitted to the Court for consideration and decision.

Upon consideration thereof, and the assignment of errors, this day filed, IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United States for the Northern District of California, Southern Division, made on August 12, 1932, be, and the same hereby is allowed, conditioned upon the giving of a cost and supersedeas bond in the sum of Seven Hundred and Fifty Dollars ($750.00) within ten days from date.

United States of America.—ss.

The President of the United States of America.

To E. C. Street, as Trustee in Bankruptcy of the Estate of Henry Duffy Players, a Corporation, Bankrupt, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Louis E. Goodman, is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable CURTIS D. WILBUR, United States Circuit Judge for the Ninth Circuit, this 8th day of September, A. D. 1932.

[Seal] CURTIS D. WILBUR,
United States Circuit Judge.

Received a copy of the within citation this 12th day of September, 1932.

REUBEN G. HUNT,
Attorney for E. C. Street, Trustee.

[Endorsed]: Filed Oct. 5, 1932, 3:34 P. M. Walter B. Maling, Clerk. [10]

[Title of Court and Cause.]

STATEMENT AND STIPULATION,
Under Rule 23(8).

The errors on which appellant intends to rely are the two assigned, under numbers 1 and 2, in his assignment of errors; and the parts of the record which he thinks necessary for the consideration thereof are as follows:

1. This statement and stipulation.

2. Minute order of September 7, 1932, allowing appeal.

3. Assignment of errors.

4. The following papers from the transcript returned by the Clerk of the District Court: (a) order of August 12, 1932; (b) agreed statement of the case; (c) opinion of the District Judge.

GEO. M. NAUS,
GOODMAN, BACHRACH &
BROWNSTONE,
Attorneys for Appellant.

Stipulated, that the clerk shall print only those parts of the record designated hereinabove.

REUBEN G. HUNT,
Atorney for Appellee.

[Endorsed]: Filed Oct. 17, 1932. Paul P. O'Brien, Clerk.

[Endorsed]: No. 6960. United States Circuit Court of Appeals for the Ninth Circuit. Louis E. Goodman, Appellant, vs. E. C. Street, as Trustee in Bankruptcy of the Estate of Henry Duffy Players, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 15, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 18

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS (a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

GEORGE M. NAUS,
Alexander Building, San Francisco,
GOODMAN, BACHRACH & BROWNSTONE,
Russ Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS (a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

May it please the Court:

This appeal is from an order of the District Court, made by way of *sua sponte* "review", disallowing and striking out a disbursement item of $500.00 from the trustee's final account, which item had been disbursed by the trustee pursuant to an order of the referee that had become final.

The record includes the order, an agreed statement of the case under Equity Rule 77, a copy of the opinion of the District Court, and an assignment of errors.

The agreed statement of the case (Trans. 2-5) condenses the facts, and we therefore quote it in full as our statement under Rule 24:

I.

STATEMENT OF THE CASE.

The question presented by the appeal of Louis E. Goodman arose and was decided in the District Court as follows:

On June 6, 1930, Henry Duffy Players, a corporation, was adjudicated an involuntary bankrupt upon a petition filed in this [District] Court on May 17, 1930, and the administration of the estate of said bankrupt was referred generally to Honorable Thomas J. Sheridan, one of the standing referees in bankruptcy of this Court, and a receiver was appointed and qualified on May 17, 1930, and operated the business of the bankrupt until the appointment and qualification of the trustee on July 1, 1930. With the permission and approval of this Court, Louis E. Goodman was regularly appointed and rendered services as attorney for said receiver, in accordance with General Order XLIV, and Reuben G. Hunt was regularly appointed and rendered services as attorney for said trustee. In December, 1931, three matters came on for hearing and decision by said referee: (1) the trustee's second and final account; (2) an application by said Reuben G. Hunt for an allowance of $5,140.50 to him as compensation for his services as attorney for said trustee; (3) an application by said Louis E. Goodman for an allowance of $500.00 to him as compensation for his services as attorney for said receiver, which application and the hearing thereon fully complied in all respects with General Order XLII. All three matters, as aforesaid, were regularly heard, and on April 16, 1932, said referee decided

them and entered orders as follows: (1) said account was settled; (2) the said application of said Reuben G. Hunt was allowed in part and disallowed in part; (3) the said application of said Louis E. Goodman was allowed in full.

No petition for review under General Order XXVII, nor any petition for review at all, was ever filed, with respect to either the order settling the account, as aforesaid, or the order allowing the application of said Louis E. Goodman. Neither of those matters was contested before either said referee or this [District] Court. Rule 9 of the Bankruptcy Rules of this [District] Court is as follows:

> "A petition for a review by the Judge of an order made by the Referee, as provided in General Order No. XXVII of the General Orders in Bankruptcy, must be filed with the Referee within ten days after the date of notice of such order. For good cause shown the Referee may at any time, within said period of ten days, grant a reasonable extension of time within which a petition for review may be filed, and grant further reasonable extensions within the period of the previous extension."

No extension of time thereunder has ever been requested or granted, in connection with the orders mentioned in this statement of the case.

Said Reuben G. Hunt alone filed, under General Order XXVII, with said referee a petition for review of the order disallowing his application in part, and therein set out, as error complained of, solely and only the disallowance in part of the application of him,

said Reuben G. Hunt, and praying solely and only for a further allowance to him, and said referee thereupon made his certificate under General Order XXVII. After hearing said review, this Court made the following order on August 12, 1932:

> "It is ordered that the account as allowed by the referee be and the same is approved with the exception of the item of $500 allowed to the attorney for the receiver which is stricken from the account."

II.

SPECIFICATION OF ERROR.

The District Court acted without jurisdiction in reviewing the referee's allowance of $500.00 to Louis E. Goodman, in the absence of a petition for review under General Order 27.

III.

ARGUMENT.

The District Court is without jurisdiction to review an order made by the referee, in the absence of a petition for review under General Order 27.

The administration of the estate was referred generally under Section 22 (11 U. S. C. § 45) to one of the standing referees of the Court, and in due course of administration the referee made an order allowing $500.00 to Louis E. Goodman as compensation for his services as attorney for the receiver. No petition for review of that order, under General Order 27 or at all, was ever filed. The District Court "reviewed" it

sua sponte in the course of review of a *different* order that happened to be brought before it, one that did not concern Louis E. Goodman. In fact, Louis E. Goodman was not before the Court, and had neither notice nor hearing of the contemplated *sua sponte* action.

General Order No. 27 reads as follows:

> "REVIEW BY JUDGE. When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Less than a year ago, this Court said:

> "That the procedure of review is plainly defined and *power limited* in the interest of regularity and for the common good is clearly stated by Judge Sawtelle of this court, sitting as District Judge, in Re Octave Mining Co. (D. C.), 212 F. 457, 458, as follows: 'It is manifest that the mode prescribed by General Order 27 is the only manner in which the decisions of the referee may be reviewed. * * *' " [Italics added.]
>
> *In re Faerstein,* 58 F. (2d) 942.

And to that proposition that *the mode prescribed is the measure of power* to review, the Court additionally cited:

> *In re Shelley,* 8 F. (2d) 878;
> *In re Walser,* 20 F. (2d) 136.

We here cite further decisions to the proposition:

In re Russell, 105 Fed. 501;

In re Finkelstein, 3 F. (2d) 1006;

In re Wilkes Barre Yellow Cab Co., 53 F. (2d) 1024.

"The proceeding is in substance an appeal from the court of bankruptcy—i. e., the referee—to the District Court."

In re Pearlman, 16 F. (2d) 20, 21, col. 2 (C. C. A. 2).

The rule is sound and tends to better administration of estates. Hundreds of disbursements are ordered by referees in busy districts, and the rule enables trustees safely and promptly to make disbursements as soon as an order has become final through the passage of the time in which a petition for review may be filed. Moreover, what need is there to imperil a trustee who has simply obeyed an order of which neither the bankrupt, creditor, nor other person has complained nor desires to complain?

A perusal of the memorandum opinion of the District Court (Trans. 5-6) discloses an oversight of the rule. Furthermore, the two cases cited in that opinion bear solely on the question of the receiver's divestiture of power to act as representative of the estate after a trustee has been appointed. Granting that proposition, nevertheless the receiver is not automatically removed, but must prepare and present his final account, and have it settled, before he can obtain his discharge. In the case at bar, the receiver

took custody of going theatres at San Francisco, Oakland, Los Angeles and Portland, and operated them, financing the operation through the issue of certificates; and the operating deficit resulted in controversies in the settlement of his account. Louis E. Goodman was regularly appointed as his attorney under General Order 44, and in the verified petition for compensation said *inter alia:*

> "Your petitioner [Louis E. Goodman] also attended hearings in connection with the settlement of the receiver's first account herein and in connection with the determination of the respective rights of creditors of the receivership, prepared the report of the Special Master herein, and argued the said matter before Honorable Frank H. Kerrigan, United States Judge and filed briefs herein. Your petitioner devoted at least six full days time in connection with the matters just referred to."

That service alone was worth the $500.00 allowed by the referee; in any event, the District Court (assuming arguendo that a "review" of the allowance was regularly before it) erred in ruling, in substance, that the referee was without jurisdiction to allow compensation to the receiver's attorney. The referee had jurisdiction to award some amount, and if he erred in fixing the amount through commingling authorized and unauthorized services, that is but error in the exercise of jurisdiction; the referee's order would be merely voidable under a petition to review; not wholly void and thereby open either to collateral attack or to *sua sponte* vacation by the District Court.

As the District Court was without jurisdiction to make the order appealed from, the order should be reversed.

Dated, San Francisco,
February 20, 1933.

Respectfully submitted,
GEORGE M. NAUS,
GOODMAN, BACHRACH & BROWNSTONE,
Attorneys for Appellant.

No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 19

LOUIS E. GOODMAN,
Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS (a corporation), Bankrupt,
Appellee.

BRIEF FOR APPELLEE.

JESSE A. MUELLER,
De Young Building, San Francisco,
Attorney for Appellee.

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No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS (a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

Appellant's sole contention is that the District Court acted without jurisdiction in disallowing appellant's claim for attorney's fees. Appellant cites authorities relative to appeals from DECISIONS of a referee in the nature of judicial determinations.

The appellee contends that the action of a referee in allowing attorney's fees is *not* a judicial act but an administrative one and if void, made in error or by mistake, is always subject to review by the District Judge before the estate is closed.

LAW ARGUMENT.

It is a fact that all of the parties in this matter acted sincerely and honestly believed that they were within their rights, and that there is no suggestion of fraud or misrepresentation in the slightest degree, but a mistake was made and the District Court, as a court in equity, may always rectify a mistake.

> "We see no force in the contention that the referee's allowance of petitioner's account amounted to an adjudication which the District Judge had no jurisdiction to set aside. Had the claim been that of a creditor, it would, under section 57k of the act (section 9641), be subject to reconsideration and rejection, in whole or in part, at any time before the estate was closed. But while the claim was not that of a creditor, and so not subject to the statute, it was, nevertheless, being an administrative order, subject at any time before the closing of the estate to re-examination and to such disposition as the equities of the case require. In re Ives (C. C. A. 6), 113 Fed. 911, 51 C. C. A. 541; Davidson v. Friedman (C. C. A. 6), 140 Fed. 853, 72 C. C. A. 553. A court of bankruptcy is a court of equity (Bardes v. Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175) and has undoubted jurisdiction to set aside an allowance for services and expenses of an attorney to one of its officers, when it satisfactorily appears that the allowance was procured through fraud. The allowance of the claim was thus not a final adjudication.
>
> The proposition that the referee alone had jurisdiction to re-examine the claim does not impress us. It is not accurate to say that the action allowing the claim was solely that of the referee;

in a much more proper sense it was directly the action of the District Judge. * * * The latter had complete authority, notwithstanding the general reference, to take to himself the allowance of claims of this nature. The action had was as effectively that of the judge as if had under a positive order withdrawing that subject from the referee's consideration, or as if the referee had in the first instance allowed the claim, and the matter then been brought before the District Judge for review. * * * We have lately had occasion in two cases to consider the jurisdiction of a court of bankruptcy to proceed on its own motion to correct an erroneous allowance or a fraudulent action. International Corporation v. Cary, 240 Fed. 101, 104, 105, 153 C. C. A. 137; In re Veler, 249 Fed. 633, 644, 161 C. C. A. 543."

In re De Ran, 260 Fed. 732, 740.

"The allowance by the referee (for services of an attorney) is not a final adjudication, but a mere administrative order subject at any time before the closing of the estate, to re-examination."

Collier on Bankruptcy, 13 Ed., Sec. 1358;
In re Cintion, 2 A. B. R. (N. S.) 369.

"Thus, in discretionary matters such as an allowance of attorney's fees, the referee's discretion will not be disturbed in the absence of clear mistake of fact or law."

Section 3669, *Remington on Bankruptcy,* Vol. 8, p. 48;
In re American Range and Foundry Co., 41 Fed. (2d) 845, 7 A. B. R. (N. S.) 170.

"An order of a referee making an allowance to the Trustee's attorney has been held in one case not to be 'final' but to be subject to re-examination at any time before the closing of the estate."

Section 3649, *Remington on Bankruptcy; In re Cintion,* supra.

This matter is presented upon a stipulation signed by the attorney for the trustee limiting the record to only the order of August 12, 1932, the agreed statement of the case and the opinion of the District Judge. Consideration should also be given to the following statements contained in Appellant's Petition for Allowance of Appeal on file in this court:

1. "On May 17th, 1930, G. A. Blanchard was appointed and qualified as receiver and acted as such until July 1st, 1930." (Document 1, p. 1, lines 17 and 18, Appellant's Petition for Allowance of Appeal.)

2. "That at the hearing of the said receiver's and trustee's first account the following claims and allowances were made for counsel fees:

Louis E. Goodman, attorney for petitioning creditors, claimed $250.00; Louis E. Goodman, attorney for receiver, claimed $3,000.00, allowed $1,000.00 (on both amounts)." (Document 5, page 3, Appellant's Petition for Allowance of Appeal.)

It is apparent from the record that the receiver filed only one account and that appellant's claim for five hundred and no/100 ($500.00) dollars additional attorney's fees is based upon his "attending hearings in connection with the settlement of the

receiver's first account herein and in determination of the respective rights of creditors of the receiver, etc." (Appellant's Brief, p. 7.)

His claim is for services rendered after the qualification of the trustee on July 1, 1930, and after the settlement of the receiver's account.

> "After the qualification of the trustee, the receiver is automatically divested of all authority and power to represent the estate."
>
> *Boonville National Bank v. Blakey,* 107 Fed. 891.

Appellant is therefore in no better position than an attorney appearing in the bankruptcy court representing a creditor or other litigant.

A reversal in this matter would permit the referee to allow attorney's fees in excess of the amount allowed by rule and to attorneys not entitled thereto, and if no party interested in the estate should seek a review, the order would become final.

Dated, San Francisco,
April 3, 1933.

Respectfully submitted,
JESSE A. MUELLER,
Attorney for Appellee.

No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS (a corporation), Bankrupt,

Appellee.

REPLY BRIEF FOR APPELLANT.

GEORGE M. NAUS,
Alexander Building, San Francisco,
GOODMAN, BACHRACH & BROWNSTONE,
Russ Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy of the Estate of HENRY DUFFY PLAYERS (a corporation), Bankrupt,

Appellee.

REPLY BRIEF FOR APPELLANT.

May it please the Court:

Two of the authorities cited by counsel for the appellee, at the bottom of page 3 of his brief,

Remington, Bankruptcy, § 3669;

In re American Range and Foundry Co., 41 Fed. (2d) 845,

have no bearing on the question at bar, because they relate to a review pursuant to the mode prescribed by General Order No. 27. The remainder of the citations on pages 2, 3 and 4 are

In re De Ran, 260 Fed. 732, 740;

In re Cintron, 2 A. B. R. (N. S.) 369;

Collier, Bankruptcy, 13th ed. [page] 1358;

Remington, Bankruptcy, § 3649.

Examination of the quoted text of *Collier* discloses that he cites only *In re De Ran,* supra; and examination of the quoted text of *Remington* discloses that he cites only *In re Cintron,* supra.

We therefore turn to those cases:

In the case of *In re Cintron,* supra, there was a petition for review, fully complying with the mode prescribed by General Order No. 27. The only question was whether the right of review had been waived under a standing rule of the trial Court, which required the petition for review to be filed "within twenty days of the decision complained of, or it shall be considered waived." The decision had been made in an *ex parte* proceeding, of which the complaining party had no knowledge, and it was held that the twenty days did not start running until knowledge.

Turning to the case of *In re De Ran,* supra, we find a number of grounds of distinction:

First, General Order No. 27 relates solely and only to the mode of review "by the judge of any order made by the *referee;*" and the order under review in the *De Ran* case was an order of the *judge.* Note particularly the lower half of page 737 of 260 Fed., where the Court mentions the local practice relating to applications for allowance of attorney's fees, whereunder the order of allowance or disallowance was an order of the judge. No question under General Order No. 27 was presented in *In re De Ran,* supra.

Second, not only was the review by the judge of an order by the judge, but it was not, strictly speaking, a "review" in the sense of that term as used in Gen-

eral Order No. 27. It was "a formal investigation into the administration of the bankrupt's estate," resulting in findings of the attorney's guilt of actual *fraud.* The case supports, and properly supports, the power of a Court to discipline or disbar an attorney for official *misconduct,* which power is wholly separate and apart from power under General Order No. 27. At bar, the record presents simply the matter of a referee's order of allowance of fees to an honorable attorney.

Third, the judge did not act *sua sponte* in *In re De Ran,* supra, but brought the attorney in on an order to show cause (260 Fed., at 734), and appointed a committee to prosecute the proceeding as a disbarment proceeding. See *In re Ewell,* 37 F. (2d) 289 (C. C. A. 9).

Turning to the remainder of the brief for the appellee, at his pages 4 and 5: *First,* we call attention to Equity Rule 77, which provides that the agreed statement "shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken." *Second,* if the Court looks beyond the agreed statement, then we ask that the statements on appellee's page 4 be amplified by adding the following quotation from page 2 of "Petition for Allowance of Appeal":

> "On the 30th day of July, 1930, said receiver in bankruptcy filed in said bankruptcy proceeding his first and final account and thereafter the said account upon notice duly given as provided by law, was heard by said referee; litigation arose with respect thereto and with respect to the

proper allocation of funds in the estate among creditors of the receiver and the referee in bankruptcy made an order allowing said account and settling the questions of priority between creditors and such order was reviewed by the District Judge and by him affirmed and such litigation ended there."

And also by adding the following quotation from page 4 of said petition for allowance of appeal:

"That said petitioner Louis E. Goodman acted as such counsel for the receiver from May 17, 1930, all matters pertaining to the receiver's account were fully determined."

Dated, San Francisco,
April 12, 1933.

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